been special reasons for this! and if it was one of the grounds for dismissing the summons then I think the lower court again acted prematurely.

On the other hand we have it on record that appellant wrote to his mother asking her to institute the action duly assisted by her cousin Mbodhlana. The Native Commissioner assumes from this that by doing this appellant had no intention of appearing, but the mother consulted an attorney and on his advice the action was instituted in its present form. It would appear therefore that it was the intention for appellant to figure as the plaintiff, and I find myself in disagreement with the Native Commissioner on this point also.

Rule 26 is fairly wide in its application, but it is usual to grant an adjournment and to award wasted costs against the defaulting party, and I think this course should have been followed here.

The appeal is upheld with costs and the case remitted for trial, appellant to have the right to amend his summons if such is desired.

MARTIN, Member of Court: I concur.

AHRENS, Member of Court: In concurring with the judgment of the learned President I think it necessary to add that the question arises whether the Native Commissioner was justified in dealing with the merits of the case without taking some evidence. Mbhodhlana's statement which was made without admonishment, is of no assistance whatsoever, and of no value either one way or the other. The Native Commissioner therefore was wrong in deciding on the merits of the case without having some evidence before him.

In view of the letter from Messrs. Findlay, van Aardt and Haviland under date the 20th September, 1929, which forms part of the record and where the clerk of the court was advised of the fact that the notice of the hearing was rather short as the plaintiff's whereabouts were unknown, the case should have been postponed.

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DECISIONS

OF THE

NATIVE APPEAL AND DIVORCE COURT

(TRANSVAAL AND NATAL DIVISION).

1930.

VOLUME II. PART I.

With Alphabetical List of Cases and Subject Index.

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P. VAN BILJON, M.A.

REGISTRAR, NATIVE APPEAL AND DIVORCE COURT (TRANSVAAL AND NATAL DIVISION).

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ALPHABETICAL LIST OF LITIGANTS.

SUBJECT INDEX.

DECISIONS

OF THE

NATIVE APPEAL AND DIVORCE COURT

(TRANSVAAL AND NATAL DIVISION, 1930).

FITI SITEBE v. JOHNNY SITEBE.

1930. *February* 17. Before STUBBS, President, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Rule 19, *Government Notice No.* 2254. *Application for amendment of record of case.—Jurisdiction of Native Appeal Court, section* 15 *of Act* 38, 1927.—*Exception.*

FACTS: An appeal from the decision of the Native Commissioner at Piet Retief.

Where an application for an amendment of certain alleged irregularities in the record was made by appellant's attorney at the commencement of the hearing, on the ground that the Court could grant the application under sec. 15 of Act 38, 1927, and where the attorney for the respondent raised an objection in that the application went to the root of the matters in issue and was not lodged timeously in terms of Rule 19, Government Notice No. 2254, implemented by Act 38, 1927.

HELD: That in view of the objection raised by the respondent's attorney the application must be refused, being out of time in terms of Rule 19 of Government Notice No. 2254.

HELD: That the power to review on the ground of irregularity could only be exercised by way of appeal provided that no judgment or proceeding shall, by reason of any irregularity or defect in the record or proceedings, be reversed or set aside unless it appears to the Court of Appeal that substantial prejudice has resulted therefrom as laid down in sec. 15, Act 38, 1927.

Where it was submitted on behalf of appellant that respondent was not in possession of a certificate as required by sec. 29 of Ordinance 6 of 1914 and therefore could acquire no property rights in the animal in dispute.

HELD: That there is nothing to prevent two natives buying an animal in partnership and subsequent transactions between them in regard to that animal would not in the Court's opinion be subject to the provisions of sec. 29 of the Ordinance.

Further facts clear from the judgment of the case on its merits.

HELD: That as the case in the lower court was tried out on its merits and the Native Commissioner on the facts had decided against the appellant, whatever prejudice may have been anticipated by the appellant at the commencement of the action was entirely dissipated by the evidence as a whole on which the Native Commissioner based his judgment.

The appeal on all grounds was dismissed with costs.

For Appellant: Mr. *Stegman*; for Respondent: Mr. *Caplan*.

STUBBS, P.: The action arises out of a claim by Fiti Sitebe against Johnny Sitebe his half-brother by the same father but different mothers, in respect of certain moneys and loose assets particulars of which appear in the summons, alleged to have been inherited by the first named from one Mpiake an elder brother who at the time of his death was unmarried and without issue, which at the time were in possession of Johnny Sitebe, the defendant in the court below.

The claim was resisted on a variety of grounds as more fully appear in the written plea filed of record.

A considerable volume of evidence has been led in this case, relevant and irrelevant, material and immaterial, interspersed with a good deal of evidence which is entirely hearsay and which the Native Commissioner in his reasons for judgment has made clear he has excluded from consideration in coming to a decision on the facts before him, and it is for this Court to determine having regard to the grounds of appeal, whether on those facts and in law the Native Commissioner has come to right conclusions. It seems to me from the exhaustive judgment delivered by him in this matter that he has been at great pains to sift, weigh and analyse the evidence even to its minutest detail with a patience and industry almost in excess of the exigencies of the case. He had the witnesses before him. He was able to judge from the manner in which they gave their evidence and comported themselves in the witness box to whom credence should be given and from whom it should be withheld and he has on that evidence come to the

conclusion that the plaintiff has not satisfied him that he has made out his case, and following the established rule of law and procedure, granted absolution from the instance with costs.

I propose to deal with the claims *seriatim*, as appearing in the summons. First, as regards the three horses: it is alleged that deceased purchased a mare, and the others are the progeny thereof. Appellant knows nothing of the actual acquirement of this mare except what he has heard. He says, "Mpiake told me he had bought the mare from attorney Kaplan." This is mere hearsay. He further states that when he demanded the horses respondent told him that Mpiake had given it to him. The respondent denies this statement. In cross-examination appellant admits he knew nothing of the transaction regarding the purchase of the mare. He goes on to say, however, that he knew Mpiake owed £3 on the purchase price of the horse, and that in his presence the deceased gave respondent £3 to pay off this balance to Kaplan. It is common cause that £3 was owing on the mare. The evidence of the witnesses Mdguni and Homhom is merely hearsay and they knew nothing of the actual transaction.

The evidence for the respondent is that the deceased paid £4 and respondent £3 under the arrangement that respondent should have the first foal while the property in the mare vested in deceased. After the foal was born deceased took a fancy to it and it was then agreed between them that respondent should have the mare and deceased the foal. The respondent gives, in my opinion, a very clear account of the matter and in certain essentials is corroborated by Mr. Kaplan who says he sold the horse to Mpiake who paid him £4 and the balance of £3 was paid by the respondent. The witness Nquibelo says he was present when the arrangement between deceased and respondent was made. He says, "I heard Mpiake say to Johnny 'You take the mare and I'll take the foal'." This evidence, if true, is conclusive. It corroborates respondent's story and, unless for very good reasons, should be accepted. The Native Commissioner has accepted this evidence as correct and I can see no cause to interfere. Respondent alleges that he had no claim to this foal and tendered it to appellant who would not take it as he had nowhere to let it run. He is corroborated by Homhom, a witness for appellant, and also by Nquibelo. On the weight of evidence I accept that this foal subsequently died of horse-sickness. No negligence on the part of respondent has been alleged in connection with the death of the foal.

It has been submitted on behalf of appellant that defendant was not in possession of a certificate as required by sec. 29 of Ordinance 6 of 1914 and therefore could acquire no property rights in the mare. It is clear from the receipt given by Kaplan in respect of the first payment of £4 for the mare that no *dominium* in the animal was to pass until full payment had been made. When the transaction was completed, that is when the balance was paid, Mpiake and respondent were partners for the purpose of the acquisition of the mare. There is nothing to prevent two Natives buying a horse in partnership and any subsequent transactions between them in regard to that horse would not in my opinion be subject to the provisions of sec. 29 of the Ordinance.

In the matter of thirty goats, the evidence here is again conflicting. Respondent denies all knowledge of the goats with the exception of ten, four of which were disposed of and which I will refer to later, the remaining six were delivered to appellant. In this claim for thirty goats the appellant has included eight sheep, a great deal of evidence was heard in connection with these sheep. This, in my opinion, was wrong. The appellant is bound by his summons and cannot be heard to claim anything not specifically asked for in the summons. The Court likewise cannot go outside the four corners of the summons. The matter of the sheep therefore falls away.

The claim for the goats may be described as those from Shongwe and those from Polope.

There is much conflicting evidence as to the Shongwe goats. Respondent has little personal knowledge of the matter. He is, however, emphatic that one goat was acquired from Shongwe by deceased and brought to respondent's kraal and that it subsequently increased to twelve. Much hearsay evidence, given in connection with these goats, has to be eliminated. Shongwe says some years before deceased's death he delivered two goats, he cannot say what the increase was. Mahuba, a younger brother of appellant, who was the herd, agrees that the goats increased to twelve. This is disputed by respondent, who says that the Shongwe goat increased to three, that delivery was made a long time before Mpiake's death and that they were killed by the latter on various occasions. The witness Mqibelo, who knows the family well and resides in close vicinity, corroborates the respondent's story and the details concerning the killing of these goats. The witness Mahuba is a younger brother of appellant and is

living at his kraal. The feeling between him and the respondent is strained and under these circumstances I consider that the Court would not be justified in wholly disregarding the evidence of the respondent and his witness in favour of the two brothers whose evidence in my opinion is in no way more worthy of belief. The *onus* is on the appellant to prove that the respondent was in possession of the twelve goats. This he has failed to discharge.

In regard to the number of goats delivered by Polobe, the Native Commissioner admits that he has found it difficult to decide what is the truth and says he had considerable doubt on the point. Polobe first says he delivered ten goats, immediately afterwards, according to the evidence, he corrects himself and says eleven goats were delivered after the death of Mpiake. Appellant's evidence on the point is mainly hearsay. He says, however, respondent admitted receiving the goats and said deceased had given them to him. This alleged statement of a gift is significant. Throughout his evidence appellant has maintained that all his claims to the different animals were met by the reply from respondent that, "Mpiake gave them to me." This has been strenuously denied by respondent. The question naturally comes to mind: If respondent in this instance said he had received the goats as a gift why did he hand them over to appellant? His action can only be construed as consistent with his statement that he never referred to any gift by Mpiake. Appellant admits he does not know the goats and says he has never seen them, and in cross-examination says, "I know there were ten goats with Polobe but Polobe said there were eleven." Where did he get his information that there were ten? The record is silent on the point. Respondent says only ten goats were delivered. This comprises the total evidence on the point. It is therefore a matter of deciding between the evidence of Polobe and respondent. I agree that there must be some doubt in the matter and, the *onus* being on appellant (plaintiff), the judgment of the Native Commissioner in that regard, was correct. Respondent delivered six goats to appellant and duly accounted for the other four.

Appellant submits that the judgment in respect of the claim for eight cattle was against the weight of evidence and asks this Court for judgment in his favour for four head of cattle or £20.

Appellant's claim was for fifteen cattle. Appellant in his evidence established the existence of thirteen cattle, a red cow, originally purchased by deceased from one de Jager and her progeny

of four, also eight cattle which were acquired for *lobolo* purposes. The matter of the first five cattle does not arise as appellant has received these cattle from respondent. Appellant's evidence in regard to these cattle is mostly hearsay. All he knew is what was told to him by the deceased. The point of importance in his evidence is that he says that respondent told him that Mpiake, the deceased, had given him the money and that the respondent had bought the eight cattle for Mpiake as *lobolo* cattle. It is common cause that eight cattle were acquired and were in the possession of respondent. Appellant does not know from whom the cattle were acquired but states that he heard they came from Hansen. Mahube, the herd, states that the cattle were brought to their kraal by deceased and that respondent told him that the cattle belonged to Mpiake. The witness Vilagazi can throw no light on the ownership of the cattle. He knows that the cattle were for the purpose of loboloing a wife, in fact his daughter, for Mpiake. He saw the cattle, but was never told they were the property of Mpiake. Malewa, another brother of the appellant, says, respondent, when demand was made on him by appellant, said the eight cattle had been given to him as a present by Mpiake.

The respondent in reply to this claim says he is the eldest brother and in accordance with Native custom responsible for the procuring of a wife for his younger brothers and that in accordance with this custom he acquired, for the purpose of loboloing a wife for Mpiake, eight cattle from a Mr. Hansen. Four of these cattle were acquired for cash and he exchanged an ox, his property, for two cattle and one ox, the property of deceased, he also exchanged for two cattle. Hansen in his evidence corroborates this and is definite on the point that the transaction was between himself and the respondent. In fact he did not know the deceased. This therefore disposes of the question of ownership in so far as six of the cattle are concerned. In analysing the evidence I find no proof that respondent utilised money given to him by Mpiake for the purpose of the cattle. On the contrary the probabilities too are in his favour and his allegation of personally making provision for the acquirement of a wife for his younger brother is in accordance with Native custom. Before the woman was lobolaed Mpiake died. Respondent never parted with the ownership in the cattle. As regards the two cattle which were the property of Mpiake, respondent's explanation is that they died. The herd, Mahube, who

might have been in a position to furnish information on the point was apparently not questioned as to whether he knew of the death of these cattle. There is no evidence that these cattle are in existence. Homhom states that some oxen have died, but cannot say whose property they were. Nquibelo is definite that two of the eight cattle received from Hansen died and that he knew the cattle and both belonged to Mpiake. This witness' evidence has been impeached on the ground that he made a previous sworn statement contrary to his evidence. This statement, however, was never put in. His evidence is corroborative of respondent's. There is nothing to prove that the appellant's explanation in regard to these two cattle is untrue.

In the matter of the saddle, respondent was in possession and the *onus* was therefore on appellant to prove ownership. For the appellant the saddle was claimed as the property of the deceased. Respondent admits that ownership originally vested in the deceased but says that the saddle was given to him by the deceased in liquidation of a debt of £5 owing by the latter. There is conclusive evidence of this debt and nothing to show that the debt was otherwise liquidated. There is evidence too that respondent used the saddle at will before the death of Mpiake. The explanation given by respondent is reasonable and has not been rebutted by appellant.

Under 3 (B1) of the notice of appeal the Native Commissioner's judgment is attacked on the ground that he wrongly placed the *onus* of proof on plaintiff instead of upon the defendant.

Plaintiff (appellant) in his summons alleges that defendant (respondent) had in his possession the stock and articles enumerated in the schedule appended thereto belonging to deceased Mpiake which in accordance with Native customary law was inherited by plaintiff (appellant). Defendant's (respondent) answer is a denial of liability and he specifically states the ground on which he relies and in effect puts the plaintiff to the proof of his claims.

I am not disposed to say that the Native Commissioner in dealing with the case, as he undoubtedly did, purely as one between native and native, and on other aspects, was wrong in deciding that the *onus* rested upon appellant (plaintiff in the court below). Even if he were wrong in so doing, we should not be justified in reversing his judgment in the absence of prejudice. The case was tried out on the merits and the Native Commissioner on the facts decided against the plaintiff (appellant), so that whatever prejudice may

have been anticipated by the plaintiff at the commencement of the action was entirely dissipated by the evidence as a whole on which the Native Commissioner based his judgment. There is nothing to indicate on the record that the plaintiff's (appellant) attorney at any time during the course of the proceedings sought to have the *onus* cast upon the defendant.

On the provisions of sec. 29, Ordinance No. 6 of 1904, the Native Commissioner, Piet Retief, made the following remarks:

"This section works very harshly in the case of transactions between Natives. Every *lobolo* case is going to be hit by this statutory enactment and much hardship and sorrow flows from it. In my opinion it should be repealed.

"In this case an attempt was made to deprive a party of certain stock that had been in his possession for several years on the grounds that no certificate had been obtained in terms of sec. 29 of Ordinance 6 of 1904.

"Sec. 11 of Act 38 of 1927 has ordained that the custom of *lobolo* shall be recognised by the Courts, and I view with alarm the prospects of litigation that may ensue if the provisions of the section above quoted are insisted upon as between Native and Native in matters connected with their customs.

"I suggest that the Government be approached with a view to modification of the section in question so as to cover cattle transactions between Native and Native in matters connected with custom, which are invariably carried out with due forms and ceremonies and in the presence of witnesses who are well acquainted with the parties and their possessions."

The appeal on all grounds must fail with costs.

GANE, Member of Court: I concur.

GOLDSWORTHY, Member of Court: I concur.

1930. *February* 19. Before STUBBS, President, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Gratuitous depositum.—*Gross negligence.—Ownership.—Rule* 26 (*a*) *Government Notice No.* 2253.—*Absolution.—Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Johannesburg.

In the court below respondent sued appellant for the sum of £13 4s. being for hire of a certain horse or payment of its value £15. The Court absolved defendant from the instance in regard to the claim for hire and granted judgment for plaintiff as prayed with costs in regard to the claim for the horse or its value. An appeal was lodged by defendant in regard to the judgment on the second claim, on the grounds that respondent (plaintiff) was not the right party to sue and also that respondent was placed in the position to recover the horse but failed to take delivery.

It was maintained by respondent that the horse was hired to him by appellant, while appellant alleged that the animal was left with him for training by the father of the respondent.

It further transpired during the course of the argument that the Native Commissioner signified his intention at the commencement of the proceedings of giving judgment for the respondent (plaintiff) but owing to the intervention of counsel for the plaintiff he was prevailed upon to hear the evidence and try out the case. Colour was lent to this by appellant's own statement to the Appeal Court that on the day of trial he appeared with his witnesses before the Native Commissioner and was informed that he and his witnesses would not be called.

HELD: That as the Record did not disclose that the question of ownership was waived the Court cannot be called upon to decide this matter.

HELD, further, that as the horse had not been hired to appellant but left with him for training for the benefit of the owner and when it got lost the recognised rule of law must be applied that where a bailment is for the benefit of the bailor alone, only slight diligence is required on the part of the bailor and in the case of a gratuitous *depositum* the depositary is only bound to take slight care of the thing entrusted to him and will therefore only be liable for gross negligence or fraud.

The appeal was sustained with costs and the judgment in the court below altered to one of absolution from the instance with costs.

The attention of Native Commissioners was directed to Rule 26 (*a*) of the rules of procedure laid down for the guidance of Native Commissioners as defendant in the court below, now appellant, was not called upon in terms of Rule 26 (*a*) to admit or deny the claim nor a plea of any description entered. So that no clearly defined issue was before the Court.

For Appellant: In person; for Respondent: Mr. *Smits*.

Gane, Member of Court: This case comes on appeal from the Assistant Native Commissioner, Johannesburg. In the court below respondent sued appellant for the sum of £13 4s. being for hire of a certain horse or payment of its value £15. The Court absolved defendant from the instance in regard to the claim for hire and granted judgment for plaintiff as prayed with costs in regard to the claim for the horse or its value. It may have been pointed out that the defendant was not called upon to plead to the summons.

The defendant has lodged an appeal in regard to the judgment on the second claim, there is no cross-appeal. The appeal is lodged on the grounds that respondent is not the right party to sue and also on the grounds that respondent having been placed in a position to recover his horse failed to take delivery of the animal.

The respondent maintained that the horse was hired by him to appellant, while appellant alleged that the animal was left with him for training by the father of the respondent. The Assistant Native Commissioner after hearing the evidence found that the contract of hire was not proved, and I find no reason to differ from him in this respect. The evidence was contradictory on that point, while there was ample evidence to show that the horse was not properly trained and had been left in care of the appellant for training—a service to be rendered gratuitously. It is common cause that the horse was lost form the veld near Nourse Mines during appellant's absence and while it was in the control of his servants. This loss was duly reported to the owner and to the police.

In regard to the first ground of appeal, viz.: that the respondent is not the party to whom he is liable to account for the horse, the appellant maintains that the agreement was made with respondent's father and not with respondent. This defence was in point

during the hearing of the case for plaintiff in the court below, but at the conclusion of plaintiff's case the Record bears the following note: "Mr. Hertzen closes his case subject to Mr. McCarthy waiving question of ownership of horse." There is nothing to show that the question of ownership was waived: an application for absolution was thereupon made and apparently refused though this is not recorded and at the next hearing Mr. McCarthy withdrew from the case. Thereafter appellant gave evidence to the effect that respondent was not the party to sue. If Mr. McCarthy did waive the question of ownership this should have been duly noted on the record, and any further evidence in regard to that point ignored. As the evidence has been recorded it leaves this Appeal Court uncertain as to what actually transpired, and apparently the appellant was unaware of any admission made by the attorney.

The horse in question was left with appellant for training, i.e., for the benefit of the owner and while in possession of the appellant or his servants it was lost. It is further on record that appellant lost one of his own horses about the same time. It is a recognised rule of law that where a bailment is for the benefit of the bailor alone, only slight diligence is required on the part of the bailor and in the case of a gratuitous *depositum* the depositary is only bound to take a slight care of the thing entrusted to him and will therefore only be liable for gross negligence (*culpa lata*) or fraud.

The evidence of Johannes Mokwena is to the effect that defendant has no stable and that "the horses feed on the veld by Nourse Mines." This is the only evidence on record showing the conditions under which appellant ran his horses. Respondent, or the owner, presumably knew the conditions under which the animal would be cared for viz., that it would run on the open veld and not be regularly stabled. There is nothing to show that the horse was not looked after as well as appellant's own horse, and there is consequently no proof of gross negligence on his part. In the absence of proof of gross negligence the respondent is not entitled to succeed. There is, however, another matter that must be mentioned, viz., that the horse, when recovered by the police at Cleveland was tendered to the owner, who declined to take delivery. As respondent was in a position to regain his property he cannot now sue appellant for the property or its value. In my opinion the appeal succeeds, and the judgment in the court below should be altered to one of absolution from the instance with costs in both Courts.

STUBBS, P.: In concurring with the views of the learned Member on the merits I feel called upon to comment on the somewhat novel methods of procedure resorted to by the Native Commissioner in this case. It has transpired during the course of argument that the Native Commissioner signified his intention at the commencement of the proceedings of giving judgment for respondent, plaintiff in the court below, but owing to the intervention of counsel for the plaintiff he was prevailed upon to hear the evidence and try out the case.

Colour is lent to this by the appellant's (defendant in the court below) own statement to this Court, that on the date of trial he appeared with his witnesses before the Native Commissioner and was informed that he and his witnesses would not be called.

In the proceedings before us no regard has been had to the forms of procedure laid down in the rules of court. Defendant in the court below, now appellant, was not called upon in terms of Rule 26 (*a*) to admit or deny the claim, nor was a plea of any description entered. So that no clearly defined issue was before the Court.

I have had occasion previously to comment adversely upon the conduct of cases in the Court of the Native Commissioner at Johannesburg and in the case *Thomas Mafane* v. *James Mohau* (N.A.C. 1929), attention was directed to the entire absence of any attempt on the part of the Native Commissioner to observe the rules of procedure laid down for the guidance of Courts of Native Commissioner in that and other cases dealt with by him and brought in appeal to this Court. While in the trial of issues between Native and Native reasonable latitude in the pleadings and procedure must necessarily be allowed, in the case before us the Native Commissioner has adopted methods little else than a caricature of procedure wholly obscuring the issue we are asked to decide.

By the Act 38 of 1927 the Legislature has sought to bring into being forums—Courts of Native Chief, Native Commissioner and of Appeal—designed to suit the psychology, habits and usages of the Bantu, creating as nearly as possible the atmosphere of the lekgotla to the arbitrament of which they have from time immemorial been accustomed to submit their disputes. While the attempt has been made to create forums and forms of practice and procedure approximating to Bantu conceptions of legal jurisprudence, the machine has been made sufficiently flexible to meet the needs of the Native who has emerged from the tribal state to the wider and

more enlightened one of western civilisation and its systems of legal jurisprudence. It is nevertheless a moot point whether the Bantu in the latter category is more at home and in happier frame of mind in an environment which imposes upon him a system differing from his own. But he does indeed ask and expect, whether we apply the one system or the other, that we shall at least do so in such fashion and in such manner as will make it both reasonable and intelligible. In his own lekgotla issues in any cause of action are direct and simple. The complainant states clearly and succinctly the ground of his plaint. The respondent similarly states his ground of defence. Thus the issue is raised and the lekgotla proceeds to hear the evidence, argument and thereafter decides the issue. Our system broadly is more elaborate and complicated but fundamentally not radically different. And we ought to avoid complicating the issue by disregarding, as has been done in this case, recognised canons of practice and procedure.

The appeal is sustained with costs and the judgment in the court below altered to one of absolution from the instance with costs.

GOLDSWORTHY, Member of Court: I concur.

JACOB NTSABELLE v. JEREMIAH POOLO.

1930. *February* 20. Before STUBBS, President, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Native customary law.—Custody of illegitimate child of a minor.—Recovery of disbursements made.—Section 11 *of Act* 38 *of* 1927.—*Election to decide issue on Native law or common law principles.—Children's Protection Act*, 1913.

FACTS: An appeal from the decision of the Native Commissioner at Benoni.

Plaintiff in the court below sued defendant for refund of amounts disbursed by himself personally for support and burial of his daughter's illegitimate child of which defendant was alleged to be the father. Judgment was given for plaintiff with costs.

Appeal was brought against this judgment in that respondent (plaintiff) should have established his paternity over the child

and should have sued in a representative capacity and that there was no contractual liability between the parties.

The point for consideration before the Court was whether the respondent (plaintiff) was entitled to sue and whether the case should have been dealt with under common law or in accordance with Native custom in terms of sec. 11 of Act 38 of 1927, as the Record did not disclose under what law the Native Commissioner elected to deal with the case.

Held: That in Native law an illegitimate child belongs to its maternal grandfather and is never recognised as belonging to its mother who is a perpetual minor. The father can claim damages from the seducer of his daughter to compensate him for reduction in the number of *lobolo* cattle he was likely to receive on marriage of his daughter, but the illegitimate child remains his, and does not necessarily ever become legitimate. Consequently the maternal grandfather can have no claim for maintenance of the child which is his own property and which he is obliged to maintain.

Held, further, that as common law holds the father of the illegitimate child responsible for the maintenance of his child and imposes penalties under the Children's Protection Act for failure to do so, the maternal grandfather in the interests of the child was entitled to sue under common law and to claim to be reimbursed any expense to which he had been put when the natural father repudiated paternity and neglected his legal duties.

Held, further: That as sec. 11 of Act 38 of 1927 provides the Native Commissioner with the election of either common law or Native law when dealing with a matter, the law that provides the remedy should be applied and Native Commissioners should as far as possible signify the intention of their election in dealing with issues before them in order that the law providing the remedy for the aggrieved party may be applied.

The appeal was dismissed with costs.

Case referred to: *Charles Solomon* v. *William Mutato* (N.A.C., Transvaal and Natal, 1930).

For Appellant: Mr. *L. W. Ritch;* for Respondent: Mr. *Robinson.*

Gane, Member of Court: The plaintiff in the court below (respondent on appeal) sued defendant (appellant) for refund of amounts disbursed by himself personally for support and burial of his daughter's illegitimate child, of which he alleged appellant was the father and judgment was given in his favour for the sum

of £21 17s. 6d. and £1 with costs. The appellant has noted an appeal on grounds which will be dealt with later.

The first point for consideration in this appeal is whether the respondent is entitled to sue and whether the case should be dealt with under the common law or in accordance with Native custom? The Native Commissioner in his " Further Reasons " dated the 29th November, 1929, has unfortunately intermixed the common law with Native customary law, and his conclusions of Native law are far from sound; it is advisable before proceeding further to consider the position under the laws mentioned. The mother of an illegitimate child—herself a minor—is under the control and guidance of her father, who, according to both common and Native customary laws is required to support her. Under the common law the father by virtue of his relationship is required to maintain and support his daughter's illegitimate child, if not supported by its natural father. The common law on this point is so well known as not to require further mention. Under Native customary law the position is similar and yet different. An illegitimate child belongs to its maternal grandfather, and is never recognised (as under European law) as belonging to its mother, who, according to Native law is a perpetual minor. The father under Native law is entitled to claim damages from the seducer of his daughter to compensate him for reduction in the number of *lobolo* or *bohadi* cattle he is likely to get on marriage of his daughter, but the illegitimate child remains his, and does not necessarily ever become legitimate. In Native law consequently the maternal grandfather can have no claim for maintenance of the child, which is his own property and which therefore he is obliged to maintain.

The question next arises whether the maternal grandfather having maintained the child can recover any disbursements made by him under the common law, and whether any notice to the natural father is necessary. As to the latter point it is clear in the present case that the father (appellant) had repudiated responsibility, and no good purpose would have been served by making a demand which was bound to prove abortive; I consider any objection on this point must be overruled. Now the person mainly liable under common law for the support of a child is the father—and it may here be pointed out that under the Children's Protection Act of 1913 the father is liable to certain penalties for failure to support his child—and, if the natural father repudiates paternity and neglects his legal duties, which are then taken up by the maternal

grandfather in the interests of the child, who is unable to fend for himself, then in my opinion that other party is entitled to claim to be reimbursed any expense to which he has been put by the defaulting father, more especially as under the common law he himself is obliged to support the child if the natural guardian does not do so. Under the common law then it seems to me that the respondent in this case is entitled to sue. The question, however still remains to be settled whether this case should be dealt with under European or Native law?—The Record does not disclose under what law the Native Commissioner has decided the case. The respondent is a Minister of the Apostolic Church residing presently in the Benoni Location, and formerly at Modder "B"—presumably in a Native Township. It is not clear from the Record whether he is a detribalised Native, and whether he is married by European rites, but in view of his calling and residence the Court is, I think, entitled to assume this. Appellant is stated to reside at Witklipbank, Delmas—presumably a farm—but it appears from the Record that he is married by Christian rites, is employed in the painting trade in some capacity or other, and for some years past has lived in a more or less civilised state. It is therefore in my opinion right that the case should be decided according to the common law.

Four grounds of appeal have been lodged according to the letter of the 27th November, 1929, viz.:

1. *Respondent should have sued in a representative capacity.*—The respondent sued for refund of amounts disbursed by himself personally, and the fact that it was necessary to establish paternity does not affect the position. It is not necessary for him to sue in a representative capacity for monies claimed in his personal capacity.

2. *Res Judicata.*—The judgment in the Court at Springs in 1927 was "Claim dismissed with costs," which is equivalent to a judgment of absolution; further the plaintiff in the present case was not the same as in the previous case; the respondent is not debarred from suing. This point has not been pressed in argument by Mr. *Ritch.*

3. *No Contractual liability between the parties.*—This has been dealt with in my earlier remarks.

The fourth ground alleged that there was insufficient corroboration of the evidence of Filita, and that the evidence of the appellant imputing incorrect interpretation of his evidence in the Springs case should have been accepted.

Filita in evidence alleged that appellant used to visit and cohabit with her from December, 1926, to April, 1927, when, owing to her condition, she left her employment at Benoni and went home. She states the child was born in the month after November, 1927—but later explained " The child was born, a month went by, and then came Christmas month "—this agrees with the evidence of respondent who states that the child was born in October, 1927. Her evidence as to intimacy with appellant is supported by her sister Dorcas who slept in the room with Filita. Dates given by both witnesses are vague and uncertain but this is not unnatural where young native girls are concerned. Dorcas says: " When we all separated (i.e. returned home) it was after Christmas of 1926. 1927 had just begun . . . . . we left after New Year of 1927," and later she says: " I can't say how long after 1927 New Year it was that we separated—it was not a full month." One significant passage of Dorcas's evidence may be quoted—(page 9): " I went home for two months after we left Filita's room, and I went to work in Benoni for Mrs. Peak for four months—then I went home—the child was already born." As the child was born in October this clearly fixes the date of departure of the two girls for home in April, 1927, and Filita's evidence is that intimacy continued up to the time she went home. There is sufficient evidence to establish a *prima facie* case against the appellant as the father of the child, and the *onus* is on him to rebut that evidence.

The appellant denies that intimacy ever took place; he admits that he courted Filita from October to December, 1926, but then left her as he heard she had another lover; further, he has attempted to show that owing to having to work overtime it was impossible for him to have visited Filita after December, 1926. Now in October, 1927, at Springs, appellant was sued by Filita for damages for seduction and in the course of his evidence stated, " I left Filita in January. I admit having cohabited with Filita in Brakpan. I saw she had many young men and that is why I slept with her." In giving evidence in the present case he denies having made these statements. It was admitted in argument before this Court that the same interpreter interpreted the evidence in both cases. No evidence has been advanced supporting the contention that the interpretation was incorrect, and the record of the Springs case must be taken to correctly reflect the evidence given. Appellant's evidence in that case negatives the value of his denial of intimacy in the present case. If then appellant had intercourse

with Filita in January, 1927, the Court must assume, in view of the definite evidence of Filita, that he was the father of her child.

As regards the evidence of Tshanuko, there is no corroborative evidence, and as Filita denies having associated with him at any stage, this Court cannot accept his evidence as being of any value. In giving evidence at the Springs Court in 1927, this man stated, "I have no home, no cattle and my father is dead." Clearly he is a man of straw and has nothing to lose by taking the blame to shield a friend, as he probably has done.

In my opinion the evidence supports the finding of the Assistant Native Commissioner, that the appellant is the father of Filita's child, and consequently he is responsible for the maintenance of that child. The Assistant Native Commissioner found that £21 17s. 6d. was a reasonable amount to award for maintenance and £1 for burial expenses. No objection has been raised to the amounts.

The appeal should be dismissed with costs.

STUBBS, P.: I concur.

This case demonstrates the desirability for a Native Commissioner to indicate whether in terms of sec. 11 of Act 38 of 1927 he has elected to decide the matter in accordance with principles of Native law or common law to prevent confusion.

The discretion under the section is a judicial one and should be exercised accordingly.

It is conceivable that under the one system the aggrieved party may have no remedy, while under the other he may have such remedy, the one providing the remedy should be followed as emphasised in the appeal case *Charles Solomon* v. *William Mutato* (N.A.C. 1929). It is therefore obvious that the Native Commissioner should say what his election is. It would be inadvisable to attempt to lay down any hard and fast rule as to when or at what stage in the proceedings the Native Commissioner should signify his election. This would be largely governed by the circumstances in each case. While, however, it may be desirable that the parties should know when the hearing is begun what course the Native Commissioner intends to follows so that they may appreciate from the outset of the proceedings the manner in which the issue or issues involved may be approached, the circumstances may be such that until the legal aspects and the facts are sufficiently before him he would not be able to properly exercise his discretion.

That I can appreciate. With this general outline as a guide I shall leave the matter there but express the hope that it may be possible for Native Commissioners to avoid in the future a confusion of the two systems of law. In the case before us the Native Commissioner has shown by his reasons for judgment that, although from the outset he essayed to deal with it under Native customary law, as evidence and argument developed he in the exercise of his discretion under the section elected to apply common law principles. In the form in which the action is brought there is in Native law no remedy. The remedy lies under the common law and in the circumstances of the case the Native Commissioner was right in applying the latter.

The appeal is dismissed with costs.

GOLDSWORTHY, Member of Court: I concur.

BELLA MABAZO v. M. T. RAMASHU.

1930. *February* 21. Before STUBBS, President, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Findings of fact of trial Court.—Credibility of evidence.—Onus *of proof.—Interference of Court of Appeal.*

FACTS: An appeal from the decision of the Native Commissioner at Krugersdorp.

Appellant in January, 1926, transferred to respondent a certain stand and buildings in the old location, Krugersdorp. In accordance with the regulations ownership in stands vests in the local authority by whom all transfers are to be approved and registered. The transfer permit conveyed that appellant undertook to renounce all rights and interest in the said stand and buildings unconditionally in favour of respondent. Appellant claimed re-transfer of the land and buildings on the ground that the said property was merely pledged as security in respect of a seduction claim of £25 which had to be paid to respondent.

The claim was repudiated by respondent on the ground that the stand and buildings were transferred to him unconditionally in liquidation of his claim.

The actual nature of the verbal contract between the parties turned entirely on the point of credibility of the evidence.

Held: That it is a trite rule that a Court of Appeal does not lightly interfere with findings of fact of the trial courts, and that as the Native Commissioner was satisfied with the evidence of respondent, the *onus* was on the appellant to prove ownership in the property, as the transfer permit, the terms and conditions of which were known to appellant, was signed by him in persuance of the verbal agreement arrived at by the parties.

The appellant had failed to discharge the *onus*. The appeal was dismissed with costs.

For Appellant: Mr. *J. H. Humphreys*; for Respondent: Mr. *L. W. Ritch*.

Goldsworthy, Member of Court, delivered the judgment of the Court: The evidence in the case discloses the following circumstances: Appellant on the 4th of January, 1926, transferred to respondent stand No. 4, situated in the old location, Krugersdorp, with certain buildings thereon.

Ownership in the stand vests in the local authority. The tenant merely has the right of occupation. In accordance with the regulations of the local authority all transfers of stands require to be approved and registered by the local authority.

The Superintendent of the location states in his evidence, that on the 4th of January, 1926, transfer of the stand with the buildings thereon was duly effected. According to the transfer permit the appellant undertook to renounce all her rights and interest in the stand in favour of respondent. The Superintendent further says the transfer of the stand was unconditional and embraced the buildings.

Appellant now claims retransfer of the stand with the buildings thereon.

Respondent's plea is "That the property was not in the sense that the summons sets out, but that it was given in satisfaction of a claim in respect of seduction proceedings at the instance of the present defendant."

The first ground of appeal is that the plea is vague and embarrassing and bad in law. It might have been clearer but in view of the wording of the summons and letter of demand, sent to the respondent before institution of proceedings, it is sufficiently explicit and appellant could not in any way have been prejudiced.

Coming to the second ground of appeal, that the judgment is contrary to law and against the weight of evidence; appellant's contention is that she merely pledged the stand with the buildings to respondent until such time as he could recover from rentals accruing therefrom the amount of £25 which it is agreed was payable to respondent as damages for the seduction of his daughter by appellant's son. At the time of the transfer the property was bringing in a net rental of £1 per month. Therefore, according to appellant's contention the debt would have been liquidated in February, 1928. Appellant's evidence as to the nature of the contract now in dispute is corroborated by her son Kambule who was present when the matter was discussed between his mother and respondent. He says, "The property was pledged to respondent so that he could get back his £25 from the rent."

Respondent says that the stand was transferred to him unconditionally and the buildings thereon made over to him in settlement of his claim of £25 against appellant's son. His evidence is corroborated by Daniel Macumela, who was present when the transaction took place. There is further evidence that as soon as the respondent received transfer of the stand he expended £27 9s. on additions and alterations to the buildings and, during 1927 sold the property for £50.

The *onus* is on the appellant to prove that she had not divested herself of the ownership in the property, and unless she satisfied that *onus* she is bound to fail. *Prima facie* the permit is evidence of transfer of ownership and it is for the Court to decide whether the appellant's and her son's explanation is more worthy than that of the respondent and his witness Macumela. While the transfer permit does not constitute the contract, it was signed by the appellant in pursuance of the agreement formerly arrived at by the parties, and is crouched in unequivocal terms. There is no evidence that the appellant was not aware of the terms and conditions of the permit when she signed it.

The matter of the actual nature of the verbal contract between the parties turns entirely on the point of credibility of the evidence. It is a trite rule that a Court of Appeal does not lightly interfere with findings of fact of the trial court. At the same time it is the duty of this Court to carefully examine the facts and decide whether the Native Commissioner on the facts came to right conclusions. The Native Commissioner in his reasons for judgment has carefully analysed all the evidence and the probabili-

ties. He has found as a fact that the buildings were handed over unconditionally to respondent in liquidation of his claim. He had the parties before him and was in a position to judge their demeanour in Court. He says that the appellant was an unsatisfactory witness and that he could not believe her. On the other hand he was satisfied with the evidence of the respondent and especially that of David Macumela who, he says, gave his evidence in a straightforward manner.

In considering all the evidence we can see no ground for interfering with the conclusions come to by the Native Commissioner. The respondent's evidence as to the nature of the transaction is corroborated by Macumela, a witness who, as far as we know, had no material interest in the matter.

The probabilities too are against the appellant. She resides 120 yards from the stand in question, but according to her own statement she knew nothing of the considerable alterations in the way of additional rooms and new roofing which had been effected in the buildings. This lack of interest on her part cannot be reconciled with the conduct which might reasonably be expected from an owner, and respondent's contention must find strong corroboration in this behaviour. There is also considerable force in the observation that appellant took no steps whatsoever to vindicate the property until twelve months after the expiration of the period for which she states it was pledged.

In the circumstances we agree with the Native Commissioner that the appellant has failed to discharge the *onus* which rests on her and the appeal is therefore dismissed with costs.

1930. *February* 21. Before STUBBS, President, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Claim for damages against co-respondent.—Section 10 *of Act* 38 *of* 1927.—*Section* 10 (1) *of Act No.* 9 *of* 1929.—*Discretion to Native Commissioner by section* 11 *of Act* 38 *of* 1927.

FACTS: Where the question arose whether the Native Divorce Court had power to entertain a claim for damages against a co-respondent in view of sec. 10 (1) of Act No. 9 of 1929 and in view of sec. 10 of Act 38 of 1927 which provides that Courts of Native Commissioners may be constituted for the hearing of all civil causes and matters between Native and Native provided that such Courts shall have no jurisdiction in matters in which "a decree of divorce, nullity or separation in respect of a marriage is sought" (paragraph (*e*).

And where attorney for plaintiff had maintained that the Court has inherent power to deal with a claim for damages and that a claim for damages for adultery is a "question arising out of marriage" and therefore falls within the provisions of sec. 10 of Act 9 of 1929.

HELD: That, as sec. 10 of Act 9 of 1929 empowers the Court to decide a matter "which is not cognisable by a Native Commissioner's Court" a claim for damages for adultery clearly falls within the matter that may be adjudicated upon by a Native Commissioner's Court and that the Divorce Court has no power to entertain claims for damages against co-respondents.

HELD, further, that the Court has no inherent powers but is a creature of statute and is bound by the four corners of the Law under which it is established.

HELD, further, that a claim for damages is not a question arising out of a marriage and therefore does not fall within the provisions of sec. 10 of Act 9 of 1929.

The claim for damages against co-respondent was dismissed with no order as to costs.

For Applicant: Mr. *Msimang*; for Respondent: Mr. *Wearind*.

STUBBS, P.: The question arises in these cases whether this Court has power to entertain a claim for damages against a co-respondent.

Sec. 10 (1) of Act No. 9 of 1929 reads as follows:—

> "Notwithstanding anything in any other law contained, the Governor-General may . . . . establish native divorce Courts which shall be empowered and have jurisdiction to hear and determine suits of nullity, divorce and separation between Natives domiciled within their respective areas of jurisdiction in respect of marriages, and to decide any question arising out of such marriage which is not cognisable by a Native Commissioner's Court established under sec. 10 of the principal Act."

Sec. 10 of Act 38 of 1927 provides that Courts of Native Commissioners may be constituted for the hearing of all civil cases and matters between Native and Native provided that such Courts shall have no jurisdiction in matters in which "a decree of divorce, nullity or separation in respect of a marriage is sought"—paragraph (*e*)—there are other provisions which need not here be referred to.

Mr. *Msimang* has maintained in argument that this Court has inherent power to deal with a claim for damages. I am unable to agree with this assertion. This Court is a creature of statute, and is bound by the four corners of the law under which it is established.

It is further asserted that a claim for damages for adultery is a "question arising out of a marriage" and therefore falls within the provinces of sec. 10 of Act 9 of 1929. With this contention also I am unable to agree.

Now there is nothing in our law to prevent a wronged husband from condoning his wife's offence and refraining from taking proceedings for divorce, while at the same time taking action for damages against the party who has wronged him. As between Natives such a claim can be dealt with in the Native Commissioner's Courts either in accordance with Native customary law or in accordance with civil law. The discretion given to Native Commissioners by sec. 11 of Act 38 of 1927 is not extended to this Divorce Court, and it seems to me probable that the wording of Act 9 of 1929 was deliberate and that there was no omission as has been suggested by Mr. *Msimang*.

A claim for damages for adultery clearly falls within the matters that may be adjudicated upon by a Native Commissioner's Court, and as sec. 10 (1) of Act No. 9 of 1929 empowers this Court to

decide a matter " which is not cognisable by a Native Commissioner's Court ", I come to the conclusion that this Court has no power to entertain claims for damages against co-respondents.

The claims for damages are accordingly dismissed—there will be no order as to costs.

JOHN SIKOANE v. JULIUS MOKGALE, JEREMIAH LIKOANE AND ABEL TLAPANE.

1930. *February* 22. Before STUBBS, *President*, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Chief's lekgotla as legally constituted tribunal.—Executing order under Chief's judgment.—Judicial authority of Chief by statutory enactment.—Section 12 (2) *Act* 38 *of* 1927 *and Government Notice No.* 2255, *paragraph* (1).

FACTS: Where respondents were cited before the Additional Native Commissioner's Court on a claim for the recovery of three oxen with costs, and where respondents who acted *bona fide* as the Chief's messengers denied liability and averred that the cattle in question were legally attached by them in terms of a judgment by a properly constituted Court, the Chief and his lekgatla, and where the points at issue were whether the respondents in attaching appellant's cattle were actually carrying out a judgment in executive order following upon a judgment against appellant by the Chief and his lekgotla and whether the Chief and his lekgotla formed a properly constituted Court.

HELD: That the respondent as messengers of the Chief in taking possession of the cattle effected a legal attachment in terms of a judgment by a properly constituted Court.

HELD: That the Chief's authority is strengthened and entrenched by statutory enactment embodied in sec. 12 (2), Act 38 of 1927 and Government Notice No. 2255, paragraph (1), and that any ill-founded attempt to flout his authority will be resolutely discountenanced by the relative Courts of appeal.

The appeal was dismissed with costs.

For Appellant: Mr. *Friedland* (instructed by Mr. Cranko; for Respondents: Mr. *Benson* (instructed by Messrs. van Noorden & de Villiers).

STUBBS, P.: The respondents were cited before the Additional Native Commissioner's Court on a claim for the recovery of three oxen of the value of £19 10s. with costs, jointly and severally the one paying the other to be absolved.

The respondents denied liability and averred that the cattle in question were legally attached by them in terms of a judgment by a properly constituted Court—that of the Chief and his lekgotla.

The admission of the respondents of the taking of the cattle rightly shifted the *onus* of proof upon them. After they had called a number of witnesses in support of ther plea the Native Commissioner on the application of plaintiff in the court below, who called no evidence, refused to enter judgment in his favour and dismissed the summons with costs.

In giving his reasons for judgment the Native Commissioner has said: "The Court is called upon to decide two points:—

"(1) Whether the defendants in attaching plaintiff's cattle were actually carrying out a judgment in executive order following upon a judgment against plaintiff given by the Chief and his lekgotla.

"(2) Whether the Chief and his lekgotla formed a properly constituted Court," which on the evidence he has decided in the affirmative.

Mr. Liefeldt has very carefully considered the material points relevant to the issue and in discussing them he says:—

"This Court is therefore satisfied on this point that the three defendants did in attaching plaintiff's cattle act *bona fide* believing that at the direction of their Chief they were executing an order of Court. With regard to the second point as to whether the Court held by the Chief in this case was or was not a properly constituted Court, there is evidence to show that this Court was properly summoned and did assemble at Wolhuterskop on the 5th March for the hearing of the case of *Masike* v. *Sikoane*, that this Court passed judgment against Sikoane for three head of cattle. Whether the Court erred or not in its finding was not a matter for the messengers who carried out the order of the Court to question. The question as to whether Filius Mogale is a Chief appointed

under Act 38 of 1927 has not been raised and it therefore must be assumed that the fact that he has been so appointed is so well known that it was not considered necessary to raise this point. This Court finds on the evidence that the defendants acted *bona fide* as messengers executing the order of a properly constituted Court and the summons is dismissed with costs."

The grounds of appeal are:—

(1) The judgment is bad in law and against the weight of evidence and defendants did not establish a valid defence to plaintiff's claim.

(2) The plaintiff was entitled to succeed in his application for judgment in the court below as the defendants had not established their plea.

The evidence clearly established that the respondents in taking possession of the cattle were carrying out a judgment in executive order following upon the judgment against appellant delivered by the Chief and his lekgotla. Expressed otherwise: a legal attachment in terms of a judgment by a properly constituted Court.

No evidence has been adduced in rebuttal of the evidence for the respondents, nor is there any evidence in support of the allegation in the summons that the removal of the oxen by respondents was wrongful, unlawful and malicious. The oxen in pursuance of the judgment and subsequent attachment were in fact duly delivered by the respondents to the Chief. Mr. Cranko, for appellant, apparently contented himself with the evidence for the respondents and rests his whole ground of appeal on the failure, in his view, of that evidence to prove that the taking was neither wrongful, unlawful nor malicious, but there is no evidence to show anything to the contrary. Filius Mogale has said he is the Chief of the tribe and that his Court was properly constituted. How can it be seriously argued, after failure to call evidence in rebuttal of the very clear and convincing story told by respondents' witnesses that the action of the respondents in carrying out the judgment of their Chief's court was other than *bona fide* in the belief that at the direction of their Chief they were executing an order of Court?

Mr. *Friedland* in the course of argument has sought to show that the *onus* was upon respondents to prove that the Chief was properly clothed with judicial authority and that the attachment was in pursuance of a judgment of a legally constituted tribunal—in this case the Chief's court. It has also been urged in argument

that it is upon the respondents to show whether the Chief purported to deal with the matter on which his judgment was based civilly and not criminally.

We are not called upon for purposes of deciding the issue to say whether the Chief treated the matter as a civil or criminal one, nor are we called upon to say, in the absence of evidence to the contrary, that the Chief is not so clothed with judicial authority. All we have to decide is whether the messengers in making the attachment were in the circumstances of this case carrying out the lawful order of their Chief? The evidence establishes without any doubt that the answer must be in the affirmative.

It is as well to draw attention to the strengthened position of the chiefs by the recent statutory enactment by which their judicial authority is definitely entrenched and defined and any ill-founded attempt to flout their authority will be resolutely discountenanced by the relative Courts of Appeal.

The appeal is dismissed with costs.

GANE, Member of Court: I concur.

GOLDSWORTHY, Member of Court: I concur.

SOPHIATOWN LANDOWNERS' ASSOCIATION v. S. D. LETHOBA.

1930. *February* 24. Before STUBBS, President, L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Acknowledgment of debt.—Interruption of prescription.—Irregularities in conduct of case.—Rebutting evidence.—Variance of written and verbal judgments.—Onus *of proof.—Absolution.—Costs.*

FACTS: An appeal from the decision of the Additional Native Commissioner at Johannesburg.

Where plaintiff in the court below sued defendant for the sum of £5 plus £2 14s. accrued interest being balance due for an amount of money lent in 1920 in terms of an acknowledgment of debt signed by the defendant. And where the defendant pleaded

" Prescription or alternatively payment ", the Additional Native Commissioner in a verbal judgment gave judgment for defendant with costs on the plea of payment, but stated in his reasons for judgment that plaintiff association had failed to show that the period of prescription had been interrupted and that he therefore entered a judgment for defendant with costs and where appellants (plaintiffs) lodged an appeal on the grounds that in the course of the proceedings the Commissioner stopped the plaintiffs from leading further evidence in support of the interruption of the prescription, that he gave plaintiffs' attorney to understand that he was satisfied that the prescription had been interrupted and that the written judgment was consequently in conflict with the Commissioner's original intention.

And where the Native Commissioner admitted having given a written judgment on the question of prescription and a verbal judgment on the question of payment.

Held: That in dealing with matters of credibility the Court of Appeal has to rely on the opinion of the presiding officer and it will be slow to interfere with a finding on fact where the reasons adduced were reasonable but that where no such reasons were given and where the proceedings were irregular it was impossible for the Court to come to a conclusion other than to allow the appeal with costs and to alter the judgment in the court below to one of absolution from the instance with costs, which decision will leave appellants free to start proceedings *de novo* if they so desire.

For Appellants: Mr. *Smits*; for Respondent: In default.

Stubbs, P., delivered the judgment of the Court: Appellants (plaintiffs in the court below) sued respondent (defendant) in the Court of the Native Commissioner, Johannesburg for the sum of £5 plus £2 14s. accrued interest being balance due for an amount for cash lent on 6th October, 1920, in terms of an acknowledgment of debt duly signed by defendant. The defendant pleaded " Prescription or alternatively payment." The Assistant Native Commissioner in a verbal judgment on 31st October, 1929, gave judgment for defendant with costs on the plea of payment, and when called upon to furnish " Reasons for judgment " stated " Plaintiff's Association having failed to show that the period of prescription has been interrupted, I find that the debt is prescribed. In any case I am of opinion that the weight of evidence goes to

show that plaintiff Association has not established its claim, but I rely on prescription in giving my judgment; and judgment must therefore be for defendant with costs."

Appellants have lodged an appeal on grounds set forth in "Notice" of the 20th November, 1929, of which paragraph (*f*) may be quoted: "That in the course of the proceedings the Commissioner stopped the plaintiff from leading further evidence in support of the interruption of the prescription, and gave plaintiff's attorney to understand that he was satisfied that the prescription had been broken or interrupted, and thereafter the defendant was put on his defence of proving the payment of the debt. At the conclusion of the defendant's case the Commissioner intimated that he did not wish to hear any further evidence for the plaintiff. Plaintiff still had three (3) more witnesses to call and could also have re-called the first three (3) witnesses to rebut the evidence of the defence. The written judgment is now based on question of prescription and is therefore in direct conflict with the Commissioner's first intimation to plaintiff's attorney which amounted to a judgment on the defence of prescription, a judgment which at the time was accepted by defendant's attorney. Appellants were therefore seriously prejudiced in their case as the *onus* of proving payment was shifted to defendant who failed to discharge that *onus*." This paragraph indicates irregularities in the conduct of the case which are denied by the Native Commissioner in his statement of the 26th November, 1929.

The Court is informed that a preliminary objection as to the right of appellant association to sue in the Native Commissioner's Court was overruled. There is no note of any such ruling on the Record. The evidence as recorded indicates that Mr. *Smits*, who appeared for appellants in the court below, confined his examination of the witnesses for plaintiffs to the matter of the interruption of prescription, and when he had closed his case he confined his examination of the witnesses for the defence to the question of payment only. While there is practically no evidence-in-chief led by the defence rebutting the evidence in regard to the interruption of prescription.

Mr. *Smits*, who has appeared for the appellants—respondent being in default and unrepresented—has informed this Court that at the conclusion of plaintiff's case the Native Commissioner indicated that he was satisfied that prescription had been interrupted—

notwithstanding that no rebutting evidence had been led by the defence—and that thereafter the *onus* was on the defendant to prove his plea of payment, a position which was accepted by Mr. *Broomberg*, who appeared for the defence. Colour is given to this statement by the manner in which evidence was led and recorded, though apart from this the record does not show anything in support. Mr. *Smits* further states that the arguments of counsel at the close of the case were confined entirely to the question of payment.

Now the Native Commissioner admits having given a written judgment on the question of " prescription " and a verbal judgment dealing with " payment ". It is difficult to understand this variance. The *onus* was on the appellants to prove that prescription had been interrupted, and if that *onus* was not discharged appellants were bound to fail. This matter should have been fully thrashed out before the question of " payment " was considered. One might well judge from the Record that the Commissioner was satisfied that there had been no interruption, seeing that rebutting evidence was not led, but if this were so, why then was evidence led on the question of payment, on which the *onus* was on respondent? The reasons given by the Commissioner are not helpful. He has not given reasons why one party should be believed in preference to another, and he contents himself with saying in his original " Reasons for judgment ": " The evidence of plaintiffs' witnesses . . . . . is unreliable, vague and uncorroborated, and I cannot accept it as a fact that defendant ever admitted verbally that he owed money . . . . . the weight of evidence goes to show that plaintiff association has not established its claim . . . . . " while in his further " Statement " he adds, " Whilst the Court still holds that the weight of evidence goes to show payment, it prefers now to rely on prescription as a stronger ground " . . . . . and further on he adds that the evidence of the witnesses of the plaintiff Association was vague and unreliable. In dealing with matters of credibility this Court has to rely on the opinion of the presiding officer, and it will be slow to interfere with a finding on fact where the reasons adduced for such a finding are reasonable. Where no such reasons are given it is impossible for the Court to come to a conclusion and ordinarily the case would be remitted for further reasons, for the leading of further evidence or for trial *de novo*.

In this case Mr. *Smits* has suggested that he will be satisfied if the judgment is altered to one of " Absolution from the instance with costs," which leaves appellants free to start proceedings *de novo* if so desired, and as this does not prejudice the respondent in any way, we are of opinion that the judgment should be so amended.

The appeal is allowed with costs and the judgment in the court below is altered to " Absolution from the instance with costs."

ABRAM MOTAUNG v. TIMOTHY MOTAUNG.

1930. *February* 24. Before STUBBS, President, L. GANE and T. BOAST, Members of the Court.

Native custom.—Lobolo *cattle for a sister apportioned to the brother before the death of the father.—Canons of equity and natural justice.*

FACTS: An appeal from the decision of the Assistant Native Commissioner of Hamanskraal.

The parties are of the Bakga-ba-Mosetla Tribe and brothers from the same " Lapa." Appellant being a younger brother and respondent the general heir to his late father's estate. A sister, also from the same " Lapa " was, during her father's lifetime, apportioned to appellant. She was subsequently *loboloed* for nine head of cattle which were paid to appellant and claimed by respondent as his property in virtue of his heirship to his late father's estate.

Appellant resisted the claim on the ground that in the customary law of his Tribe the property rights in the sister apportioned to him by his late father vested in him and he was entitled to the full *lobolo* obtained for her.

The point for decision was whether a younger brother who had already been provided with cattle out of the estate by the elder brother (respondent) to *lobolo* a wife was entitled as against the eldest son, general heir, to the estate of his late father, to the cattle received as *lobolo* for a sister who has been apportioned to him by his father before his death.

HELD: That the younger son would not as of right be entitled to the *lobolo* of his sister after having had *lobolo* provided for him by respondent from the estate of their late father.

To enrich the younger brother (appellant) from the estate of a father to the exclusion and consequent prejudice of the other younger sons as yet unprovided for in the matter of *lobolo* would be contrary to the canons of equity and natural justice.

HELD, further, that had there been a declaration by the Kraal-head, the father of the parties, to the family including the general heir of his disposition with devolution of property rights to appellant for purposes of providing him with a wife and had no provision been made by the general heir (respondent) for *lobolo* payment in respect of appellant's wife, the position might have borne a different aspect but as the contrary was the case the appeal was dismissed with costs.

For Appellant: Mr. *Smits*; for Respondent: In default.

STUBBS, P.: The Native Commissioner, Hamanskraal, sitting as a Court of Appeal, sustained the judgment of the Native Chief Hendrik Makapan in which he awarded the appellant one beast upon an action for the recovery of nine head from the respondent.

The decision of the Native Commissioner is now brought in appeal to this Court and we are to say whether or not in our opinion that decision is based upon principles of Native law?

The only point of importance to be decided is whether a younger brother, in this case the appellant, is entitled, as against the general heir (respondent), to the estate of his late father, to the cattle received as *lobolo* for a sister who has been apportioned to him by his father before his death.

The Native Commissioner called to his aid five assessors in terms of sec. 19 of Act 38 of 1927. He has stressed the fact that they are all knowledgeable men informed in the laws and customs of the tribes to which the parties belong. The first four assessors definitely state that the answer must be in the negative.

The Native Commissioner rejects the view of the assessor Makhobotloane that a son to whom in the same circumstances a sister has been apportioned acquires full property rights in her.

The parties are of the Bakga-ba-Mosetla Tribe. The facts, which are not in dispute, are that the parties are brothers from the same "Lapa." Appellant being a younger brother and res-

pondent general heir to his late father's estate. A sister, Carolina, also from the same "Lapa" was, during her father's lifetime, apportioned to appellant. She was subsequently *loboloed* for nine head of cattle which were paid to appellant and now claimed by respondent as his property in virtue of his heirship to his late father's estate. Appellant resisted the claim on the ground that in the customary law of his tribe the property rights in the sister apportioned to him by his late father vested in him and he is therefore entitled to the full *lobolo* obtained for her.

The Chief awarded him one beast, giving as his reason that it is usual, but not obligatory, that he should, in the circumstances, receive one beast from such *lobolo*.

It is not disputed that respondent as general heir provided the *lobolo* for appellant's wife. The Chief in giving further reasons for his judgment before the Native Commissioner observed that if the eldest son has a younger brother, it is incumbent upon him to furnish the latter with a wife from the cattle of their house. He says it is customary for a particular sister to be set aside for a particular son to insure the obtaining of a wife by that son, but if he has already been provided with a wife from his house, as was done here, he has no right to claim the *lobolo* received for the sister apportioned to him.

The sister's apportionment to him in the circumstances of his having already been provided with *lobolo* from the inheritance of the general heir precludes him, in the view of the Chief, the majority of the assessors and the Native Commissioner, from claiming as of right the *lobolo* derived from such sister's union.

No doubt the father in making the disposition in favour of the appellant intended it to be a provision for *lobolo*. There are two other sons younger than appellant as yet unprovided for in *lobolo*. It has not been made clear in evidence why respondent should have provided the *lobolo* for appellant when, as the evidence says, the latter had had assigned to him the sister Carolina. The inference is that the respondent at no time after having inherited his father's estate regarded the property rights in her as having devolved upon appellant and that legally she formed an integral portion of his (respondent's) inheritance. If he had failed to furnish the *lobolo* it is conceivable that the property rights in Carolina would by consent pass to appellant for purposes of providing him with *lobolo*. To hold that he would as of right be entitled to her *lobolo* after having had *lobolo* provided for him by

respondent from the estate of their late father would not, in my view, square with canons of natural equity and justice. To enrich the appellant, a younger son, from the estate of their late father to the exclusion and consequent prejudice of the other younger sons as yet unprovided for in the matter of *lobolo* would be contrary to those canons.

Two simple tests in support of the Native Commissioner's view are:—(1) If Carolina after her union deserted her husband, to whom would the latter look for the return of the *lobolo* paid by him? (2) If Carolina before her union had had an illegitimate child in whom would the property rights in such child vest?

In both instances the eldest son. In this case, the respondent.

Even the dissenting assessor Makhobotloane is constrained to admit the indisputability of the answer to (2).

Had there been a declaration by the kraalhead—the father of the parties—to the family including the general heir of his disposition with devolution of property rights to appellant for purposes of providing him with a wife and had no provision been made by the general heir (respondent) for *lobolo* payment in respect of appellant's wife; the position might have borne a different aspect but as the contrary is the case and with the weight of authority in support of the Native Commissioner's view, I am not prepared to say he has come to wrong conclusions of law.

As there is no cross-appeal on the award of one beast to appellant I am not called upon to say whether the judgment in that regard is based upon any established principle of Native law. *En passant*, the assessors in the opinion they have expressed on the point furnish very little assistance as they are both contradictory and conflicting. It is possible the award is based on the Basutu "Hloboha," to help to give up, to console by the gift of a present, similar in meaning to *solatium*: comfort. Thus by the strict Roman law women could not adopt children, but the Emperor allowed them this privilege by way of comfort for the loss of their own children.

In dismissing the appeal with costs, I wish to close on a note of compliment to the Native Commissioner in the meticulous care bestowed upon the preparation of the Record, the studied reasons for judgment and the marked interest shown in the proceedings throughout, resulting in a lucid presentment of the case and clarification of the issue. It would be well if such excellent example were emulated.

Gane, Member of Court: The respondent in this case originally sued the applicant in the Court of the Chief Hendrik Makapan for nine head of cattle being *lobolo* received in respect of their sister Carolina, and obtained judgment, the judgment of the Chief being upheld on appeal to the Court of the Assistant Native Commissioner.

The parties are own brothers and it is common cause that their sister Carolina was allotted by their father to the Appellant, who is the third son. Respondent being the eldest son and heir.

The real point this Court has to decide is what is meant by the term "allot" in native custom. The appellant maintains that by "allot" is meant to "give the property rights," while the respondent has not attempted to give an interpretation, but maintains that as he has provided the appellant with a wife and has other brothers to provide for, the cattle must come as a matter of equity and in accordance with custom.

The assessors who gave their reports as to the Native custom are unanimous that the custom of allotting a sister to a particular brother exists, but they differ as to the effect of the allotment. Assessor Makhobotloane maintains that the allotment results in full property rights passing, but the other four assessors are opposed to this.

Had the girl Carolina been married during the lifetime of her father, the *lobolo* (*bohadi*) cattle would have been received by her father, and would form part of his estate. Makhobotloane maintains that on the death of the father the appellant would automatically inherit the cattle as a present (or inheritance) given him by his father during his lifetime, even if a wife had already been provided, but here again he is in a minority of one. This assessor is evidently an educated and advanced Native and I do not doubt that his statements are made in all sincerity. It is, however, well known that educated natives are apt to fall away from the customs of their fellow-tribesmen, and it is my experience that they frequently view matters rather from the European standpoint.

The majority opinion of the assessors points to the view that the allotment of a girl to a certain son does not transfer the property rights in that girl, but is merely a special arrangement made by the father to insure the girl having a guardian to whom she can appeal for help. He is not entitled to the *lobolo* of the girl, but may receive certain of the cattle—the number is in dispute—according to the generosity of the heir. Further he becomes the

principal maternal uncle of the girl's children and as such certain benefits accrue to him on the marriages of his nieces.

It is a recognised rule of Native law that all cattle received as *lobolo* during the father's lifetime accrue to his estate and those cattle become the property of the general heir unless a disposition of property has been made with due formalities during his lifetime. *Lobolo* cattle received for a daughter are not keep apart for any particular purpose, but may be paid out as *lobolo* for one son or another, and, if this is so, then it is impossible to hold that the cattle must automatically go as an inheritance to the son to whom the girl is allotted. If then the cattle paid during the lifetime of the father fall to the general heir it naturally follows that the cattle received after the father's death must go to the general heir. If this were not the case it would as the Assistant Native Commissioner has stated in his " reasons " enable a father to make a distribution of his assets to the great disadvantage of the general heir. This state of affairs is not permitted by Native Custom which requires that the head of the house shall be the main property holder and owner as far as estate assets are concerned.

It is stated that the custom followed by the Bakgatla tribe is similar to pure Basuto custom. Among the Basutos if the daughter is married during the father's lifetime he retains the *lobolo*, which eventually becomes the property of the general heir. One beast may be given by the father to the son to whom the girl is allotted, but this is not obligatory. His responsibilities to his sister after marriage and to her children are practically as stated by the assessors in the present case. On the death of the father the *lobolo* cattle received go to the head of the house who has to provide the marriage feast—they do not go to the brother to whom the girl has been allotted, but he is entitled to " certain " cattle for all daughters of the sister in question on their marriage.

It appears then that the allotment of a girl does not carry with it the full property rights, but amounts in practice to the appointment of a particular brother as the principal natural uncle and guardian with future rights, privileges and responsibilities; consequently it does not entitle that brother to the *lobolo* (or *bohadi*) cattle, except in so far as the general heir may be prepared to be generous.

I agree that the appeal should be dismissed with costs.

T. Boast, Member of Court: I concur.

1930. *March* 4. Before STUBBS, President, and L. GANE and L. F. W. GOLDSWORTHY, Members of the Court.

Misinterpretation of directions of Native Appeal Court by Native Commissioner.—Trial de novo.—*Action to be brought within stipulated time. Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Rustenburg.

Where the judgment of the Native Commissioner was set aside with costs at a previous session, and the proceedings sent back to him for consideration of the case on its merits, in that the evidence of certain witnesses at the lekgotla was rejected as hearsay, and where the Native Commissioner misinterpreted the direction of the Appeal Court in that the evidence of the witnesses referred to must be accepted, and consequently came to the wrong finding, and gave judgment in the form of a statement which embodied in reality an academic reference to the possibilities of two propositions, that the case should either be tried *de novo*, or that more evidence should be called to enlighten the validity of the claim, and where the Native Commissioner subsequent to having given the judgment retired from the Service.

HELD: That as the Native Commissioner who tried the case was not available it was not competent to send the case back to be reopened before another judicial officer to deliver a proper judgment in terms of the previous directions of the Court. The proceedings were set aside as a whole and sent back to the Court of the Native Commissioner for trial *de novo*, action to be brought within two months.

HELD, further: That as the respondent came to the Appeal Court through no fault of his own but as a result of a wrong interpretation by the Native Commissioner of the directions of this Court in the former judgment, he should not be mulcted in the costs nor should appellant. Costs of the appeal were made costs in the cause and were to follow the result of the action in the lower court.

For Appellant: Mr. *H. Cranko*; for Respondent: Mr. *Neser*.

STUBBS, P.: This matter came before this Court in appeal in the November session of last year. The judgment of the Native

Commissioner was set aside with costs and the proceedings sent back to him for consideration of the case on its merits.

The terms of the judgment in its relevancy to the point under consideration clearly and unequivocably expressed the intention of the Appeal Court in sending the matter back to the Native Commissioner to which, for convenience and clarity, reference might be made here: The evidence of the witnesses Molatleki Moshome and Ralibuge Mekgoe having been eliminated in the court below as being hearsay, it was held by this Court on appeal that he was wrong in that conclusion and the evidence should have been taken into consideration in deciding the issue. It was emphasised in the course of my judgment that the Native Commissioner in considering the evidence of these two witnesses was in no way bound to give it credence, but was wrong in eliminating the evidence affecting the lekgotla proceedings. My brothers Manning and Goldsworthy in delivering concurring judgments also made the meaning of the appellate judgment perfectly clear. Notwithstanding, we have the Native Commissioner, in the course of his reasons for judgment, making the following amazing remark: "The Court of Appeal in its judgment has held that the evidence of the witnesses Molatleki Moshome and Ralibuge Mekgoe must be accepted . . . ." He goes on to state, that being so, "it must be admitted as an established fact, that, at the time the case was decided by the lekgotla in 1912 the late David Mekgoe was actually in possession of 57 head of cattle being those given to Hendrik by his grandfather the late Commanderberg and it is these cattle together with their natural increase numbering 220 head which Hendrik now claims from the executor in the estate of his late father. Reference is also made to certain sheep and goats, but of these there is no evidence, as to numbers. There is evidence to the effect that Hendrik received five goats, and five sheep but failed to show there were or are any others to which he was entitled and did not receive. In view of the fact that the Court of Appeal has held to have been established, namely, that in 1912 the late David Mekgoe actually had in his possession 57 cattle belonging to his son Hendrik and these cattle together with their increase he was authorised to retain until his death, which now having taken place, Hendrik claims from the executor in his late father's estate delivery of the 57 cattle and their progeny, numbering in all 220 head. To take this matter further at this stage it would appear to me that further evidence will have to be called,

in which case the burden of proof rests on the defendant executor in the estate to show what became of the 57 cattle and whether or not there was any increase. Otherwise it seems to me that the only other course to follow is to reopen the case and to proceed with it *de novo*."

The Native Commissioner has essayed to give judgment but it is no judgment at all. It is merely an academic reference to the possibilities of two propositions as a suggested solution of the matters in issue. I cannot understand how the Native Commissioner could have gone so hopelessly wrong in his interpretation of the directions of this Court which, as stated, have been so simply and clearly set out and seem to have caused no difficulty of correct interpretation by the legal representatives of the parties.

The difficulty is to know quite what to do with this case at this stage as it is understood the Native Commissioner who tried it has retired from the Public Service and is now not available. It is not competent to send it back to be reopened before another judicial officer to deliver a proper judgment in terms of the previous directions of this Court. The only course is to set aside the proceedings as a whole and send the case back to the Court of Native Commissioner, Rustenburg, for trial *de novo*.

The question of costs in this Court has been argued by both Mr. *Neser* for respondent and Mr. *Cranko* for appellant. The notice of appeal is dated the 9th of January, 1930, and was received by the clerk of the court on the 10th of January. Notice of withdrawal of appeal was, however, subsequently given to the clerk of the court on the 14th of January, so that the notice of appeal falls away and the cross-appeal becomes the substantive appeal, but for convenience will be referred to as the cross-appeal. The cross-appeal is dated the 10th of January and received by the clerk of the court on the 12th of January. The dates are particularised as the grounds of appeal and cross-appeal are identical save that in the cross-appeal, after emphasising that the so-called judgment is merely an expression of views without any stated decision, the following is introduced:—

"(*b*) Having regard to this finding that the late David Mekgoe was in 1913 in possession of 57 head of plaintiff's cattle, the Additional Native Commissioner should have ordered defendant to restore these cattle and their increase, or pay the value thereof to plaintiff. Or alternatively defendant should have been ordered to account to plaintiff in respect of the said cattle.

"(*c*) Having regard to this finding as to the *onus* being on defendant and the fact that such *onus* is not discharged by the evidence, the Additional Native Commissioner, should have found for plaintiff in respect of the 57 head of cattle and their computed increase."

As it is quite clear on respondent's (appellant in the cross-appeal) own showing the so-called judgment is not a stated decision but merely an expression of views, it would be extremely difficult to interpret the Native Commissioner's relevant remarks to mean that he has come to a finding sufficiently definite in terms to enable me to say that it amounts to a judgment within the meaning of the contention in (*b*) and (*c*) of the grounds in the cross-appeal. That being so, and as the respondent is here through no fault of his own, but as the result of a wrong interpretation by the Native Commissioner of the directions of this Court in the former judgment, he should not at this stage be mulcted in costs, nor on the other hand should appellant who has been put to the expense of coming here to secure rectification of the error in the lower court be denied the prospect of relief in this regard. I think, in the circumstances, the more equitable way out would be to order that costs of this appeal be made costs in the cause in the lower court. It is therefore ordered that the proceedings as a whole in the court below be and are hereby set aside and the matter sent back to the Court of the Native Commissioner, Rustenburg, for trial *de novo*. Action to be brought within two months from date. Costs of appeal to follow the result of the action in the lower court.

GANE, Member of Court: I concur.

GOLDSWORTHY, Member of Court: I concur.

1930. *March* 25. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of the Court.

Lobolo *cattle.—Guardianship.—House and kraal property.—Minor as heir.—Inheritance.—Apportionment of first born daughter to repay* lobolo.

FACTS: An appeal from the decision of the Native Commissioner at Mtunzini.

Appellant is the son and heir of A who had a full elder brother B. Respondent is the half-brother of A and B is the general heir of their father. B died without male issue but had four daughters, one of whom was named N. A inherited B's estate. A also died and appellant being only a child, the control of the combined estate passed into the hands of respondent the half-brother of the deceased men. N was married off by respondent who received her *lobolo* cattle, 11 head. Respondent had provided the cattle with which N's mother was married on condition that B's first daughter would be apportioned to him.

It was not clear from the record whether the cattle provided by respondent were house or kraal property, neither was there any public declaration made at the time of the marriage of the source from which the cattle that established B's house were derived.

HELD: That as the Court was satisfied that respondent did advance the *lobolo* cattle for B's wife and that these cattle came from the house of the respondent and not kraal property, respondent was entitled to recover those *lobolo* cattle of N whom the Court was satisfied was apportioned to the respondent. There being no sufficient evidence to hold that they were replaced.

For Appellant: Mr. *Howes*; for Respondent: Mr. *Milne*.

MARTIN, Member of Court, delivered the judgment of the Court: This is an appeal against the decision of the Native Commissioner of Mtunzini District, Zululand, who, on the 12th September, 1929, dismissed an appeal to his Court against the judgment of Chief Zibizendhlela which was pronounced on the 17th March, 1929.

Appellant is the son and heir of the late Mehlo whose full elder brother was named Nhlumbana. Respondent is a half-brother of these two men and is the general heir of their father Mpaka.

Nhlumbana died without male issue but he had four daughters, one of whom was named Nomatshopi. On his death his estate was inherited by his younger brother Mehlo, the father of appellant. Shortly afterwards Mehlo also died leaving three young children, one of whom was the appellant. Appellant being only a child the control of the combined estates of Nhlumbana and Mehlo and the guardianship of their children passed to their half-brother the respondent, in whose kraal the children grew up and were maintained. Appellant alleges that there were 20 goats and 5 sheep in the estate of Nhlumbana when the respondent assumed control and says that these animals were taken by respondent with the widows and children to his own kraal and that the said stock was thereafter squandered by him. In due course Nobatshopi the daughter of Nhlumbana was married off by the respondent who admits the receipt by him of her *lobolo* cattle—11 head. It is these cattle and the goats and sheep referred to that are the subject of the claim now under consideration.

The respondent does not deny the appellant's status as heir to the estates of Mehlo and Nhlumbana, nor does he deny the receipt by him of Nobatshopi's *lobolo* cattle. He claims, however, the right to retain the latter by reason of the fact that he provided the cattle with which Nhlumbana married the mother of Nobatshopi. He says that in return for this assistance Nhlumbana arranged that his first born daughter would be apportioned to him, and this was done subsequently.

It is beyond doubt that respondent did advance the *lobolo* cattle for Nhlumbana's first wife—Nyokasi. It is difficult to decide from the scanty evidence on record in this case whether these cattle were the property of the respondent's own house or whether they were general kraal property. Appellant's witness Ngoba Ntombela, who is the respondent's half-brother, declares that they were provided by their father Mpaku during the latter's lifetime, but he does not say from what source the cattle came. He admits, however, that there was a liability placed upon Nhlumbana to refund these cattle and he says they were repaid by the *lobolo* of Nhlumbana's sister Nonhluzwa, but there is no corroboration of this latter statement. The respondent's witness Mfiswa confirms the evidence of Ngoba to the effect that the cattle which *lobolaed* Nhlumbana's wife were in the first instance provided by Mpaku but he says they had been given to respondent and by him used

for the purpose stated. Here again there is nothing in the evidence to help us to decide whether or not the cattle were house or kraal property, and it is deplorable that more trouble was not taken in the lower courts to make the position clearer on this vital point. On the evidence adduced we are bound to come to the conclusion that these cattle cannot be considered to be kraal property but rather the property of respondent's house. This conclusion is strengthened by the important admission of Ngoba that Nhlumbana's mother was affiliated to the house of respondent's mother.

There appears to have been no public declaration made at the time of the marriage in respect of the source from which the cattle that established the house of Nhlumbana's first wife were derived, nor was any declaration made regarding the source from which they were recoverable and recovered. There is no room for doubt that a subsequent apportionment of Nomatshopi to respondent took place. This was confirmed by Nhlumbana on his death bed.

Having come to the conclusion that the *lobolo* cattle of Nhlumbana's wife came from the house of the respondent we are definitely of opinion that he was entitled to recover those cattle out of the *lobolo* cattle of one of Nhlumbana's sisters. His claim to have done this is not defeated by reason of there having been no public declaration made at the time of the marriage of her mother.

As regards the claim for 20 goats and 5 sheep, the appellant is supported by his sister only in saying that this number of animals was in the estate at the time it was taken over by appellant. The respondent on the other hand avers that there were only 10 goats and 5 sheep in the estate when he took over, but his witnesses Nomhluzwa (Nhlumbana's sister) and Nyokasi (Nhlumbana's widow) give the numbers as 10 and 6 respectively and we think this is the correct number. The evidence shows that 5 sheep were used by Nhlumbana's widow to pay the doctor who attended her husband, and the other animals were used in various ways for the support of the family. There is no evidence to show that the respondent benefitted in any way by these goats and sheep, on the contrary he seems to have paid the family hut taxes, sustained them for a number of years, and defrayed the valelisa fee, etc., out of his own pocket.

We are of opinion that the appeal must fail and that the judgment of the Native Commissioner must be sustained. We go further and say that had there been a cross-appeal asking for a final judgment in the court below in favour of the respondent we should have had little or no difficulty in deciding accordingly.

TSHALISI LATA v. MAQAPOLO LATA.

1930. *March* 26. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of the Court.

Registration of Chief's judgment.—Rule 13 *of Rules for Courts of Native Chiefs, framed under section* 71 *of Act* 49 *of* 1898.—*Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Ixopo.

Where it was clear from the evidence that the subject-matter of the appeal had already been adjudicated upon by the Chief at the instance of the appellant (plaintiff), wherein H., acting on his behalf, sued the respondent (defendant) for the identical cattle now in dispute and the same Chief has again adjudicated in the case before the Appeal Court; and where it would seem that the former decision was appealed by the respondent (defendant) but the trial Court entirely ignored this fact in giving reasons for judgment.

HELD: That, if the Court had to assume that the evidence before it correctly represents the position and the Chief's judgment was not reversed on appeal, the litigation on appeal could have been obviated, by H. taking out a writ of execution for attachment of the cattle and have placed appellant in possession.

HELD, further, in referring the matter back for investigation and report on the points raised, that if such a judgment had been given it should have been registered in accordance with Rule 13 of the Rules for the Courts of Native Chiefs, framed under sec. 71 of Act 49 of 1898 and if an appeal had been heard there must be a record of it.

Costs of the appeal were made costs in the cause.

For Appellant: Mr. *D. J. D'Alton*; for Respondent: Mr. *F. A. Shepstone.*

STUBBS, P., delivered the judgment of the Court: Certain aspects have been disclosed in the evidence which make it desirable that further information be placed before this Court which may render unnecessary a decision on the merits.

The appellant (plaintiff) at page 4 of the record says: "Defendant and Hlambisinye had a case over the cattle which former had paid to me. Hlambisinye sued defendant before the Chief and defendant appealed the case. I had not sued at that time. I am certain the case was tried last year. I told Hlambisinye to sue and I was advised by the men that Hlambisinye was the right person to sue."

At page 8 Hlambisinye himself states in his cross-examination: "I sued the defendant for these *lobolo* cattle and I obtained a judgment. I only sued for six head the original *lobolo* cattle. I obtained judgment for eleven head including the increase. Plaintiff had four head with defendant viz. 2 cows and 2 increase. I claimed these cattle and their increase before Chief Msigilande and he awarded me eleven head. I sued because plaintiff said he did not want to sue."

It is perfectly clear from this evidence that the subject-matter of the present appeal has already been adjudicated upon by Chief Msigilande at the instance of the appellant (plaintiff) wherein Hlambisinye acting on his behalf sued the respondent (defendant) for the identical cattle now in dispute and the same Chief has again adjudicated in the present case. It would seem that the former decision was appealed by the respondent (defendant) but the trial court entirely ignored this fact in giving reasons for judgment.

If such a judgment has been given it should have been registered in accordance with Rule 13 of Rules for the Courts of Native Chiefs framed under sec. 71 of Act 49, 1898 and if an appeal has been heard there must be a record of it.

Assuming that this evidence correctly represents the position as we find it and the Chief's judgment was not reversed on appeal, this litigation could have been obviated by Hlambisinye taking out a writ of execution for the attachment of the cattle and placing appellant in possession.

This should have manifested itself to the Native Commissioner and he should have made it his business to have satisfied himself of the nature of the Chief's judgment and the result of the appeal, if any, before deciding the case.

The Native Commissioner's attention is directed to the confusion that has been caused by the citing of Maqapolo as plaintiff and Tshalisi as the defendant in paragraphs 1 and 2 of his facts found proved, whereas the reverse is the case.

In order that these points should be cleared up the matter is referred back to the Native Commissioner for investigation and report.

Costs to be costs in the cause.

KEY PHILLIP ZWANE v. MUZIWANE ZWANE.

1930. *March* 27. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of Court.

Cattle loan for lobolo *purposes. Jurisdiction of Appeal Court.—Sections* 2 *and* 3 *of Act* 7 *of* 1910.—*Section* 182 *of the Schedule to law* 19 *of* 1891.

FACTS: An appeal from the decision of the Native Commissioner at Vryheid.

Where in the matter before the court, appellant claimed the return of cattle which he alleged were advanced by his father to his brother for the *lobolo* of his wife; and where the summons did not correctly state the ground of action as disclosed by the evidence inasmuch as the claim itself was clearly not one for the return of *lobolo,* but was in substance one for the return of *lobolo* advanced by one brother to another in the form of a loan; and where the point had been raised, that as the claim involved *lobolo,* it was not competent for the Court to entertain the appeal, in terms of sec. 3 of Act 7 of 1910, which amended sec. 182 of the Schedule to Law 19 of 1891.

HELD: That the subject-matter of the litigation before the Court did not fall within the category of *lobolo* or inheritance arising out of *lobolo,* in that secs. 2 and 3 of Act 7 of 1910 read together, contemplate *lobolo* transactions purely and simply as between the bridegroom and the girl's father or guardian, while the claim before the Court is not one for the return of *lobolo* but the return of *lobolo* advanced by one brother to another in the form of a loan.

Held, further: That the principle involved in the amending sec. is substantially the same as that in sec. 182 of the Code in respect of which it was held in the Supreme Court (Natal), that an action for cattle lent by one brother to another to assist the latter to *lobola* a wife is not barred under sec. 182 of the Schedule to Law 19 of 1891.

Case referred to: *Ukwekwana* v. *Matyana* (N.L.R., vol. 19, page 152).

For Appellant: Mr. *F. A. Shepstone*; for Respondent: Mr. *Walker-Wilson.*

On exception, Stubbs, P., delivered the ruling of the Court:

In the matter before us the plaintiff claims a return of cattle which he alleges were advanced by his father to his brother (defendant's father) for the *lobolo* of his (defendant's father's) wife.

The point has been raised that as the claim involves *lobolo* it is not competent for the Court to entertain the appeal, in terms of sec. 3, Act 7 of 1910, which amends sec. 182 of the Schedule to Law 19 of 1891.

The principle involved in the amending section is substantially the same as that in sec. 182 of the Code in respect of which it was held in the case *Ikwekwana* v. *Matyana* (N.L.R., vol. 19, page 152) that an action for cattle lent by one brother to another to assist the latter to *lobolo* a wife is not barred under sec. 182 (*supra*).

Unfortunately the summons in this case does not correctly state the ground of action as disclosed by the evidence inasmuch as the claim itself is clearly not one for the return of *lobolo* but is in substance one for the return of *lobolo* advanced by one brother to another in the form of a loan.

Secs. 2 and 3 of Act 7, 1910, read together, contemplate *lobolo* transactions purely and simply as between the bridegroom and the girl's father or guardian. While allowing unions on credit and giving the girl's father a right of action for the recovery of the *lobolo* due, which had hitherto been definitely barred by sec. 182 of the Code, they, for obvious reasons, restricted the prosecution of such claims to and no further than the Chief in the first instance and, in appeal, to the magistrate only.

As already indicated the subject-matter of the present litigation does not fall within the category of *lobolo* or inheritance arising out of *lobolo* as contemplated by sec. 3 (*supra*).

The exception is overruled.

STUBBS, P., delivered the judgment of the Court: Before dealing with the merits of this case it is necessary to refer to the main point raised by counsel for the respondent, viz.: "Whether or not the matter before us is *res judicata*?"

In support of his argument he relies very largely on the record of Native Chief's Case No. 51/1915 wherein the present respondent is stated to have sued the appellant's father, "For the estate of his late father Ndabankulu who died and left his estate to his brother Mkonodaka."

The respondent seeks to show that because he was awarded three head of cattle in that case the appellant is now estopped from setting up the present claim.

The question to be decided is, can we take cognisance of this record to the extent of holding that though the claim is stated to be for the estate of the respondent's late father Ndabankulu, he in fact intended to claim the heirship to the whole estate of his grandfather, Nselwana? There is an attempt to impeach the correctness of this Record, but we are not prepared to hold that sufficient ground exists to justify us in reading into the Record that which is not apparent on the face of it, and as long as that record stands in its present form we cannot hold that it operates as a bar to the appellant claiming heirship to the late Nselwana. Had the respondent not been satisfied with the correctness of the Record he had his remedy in taking timeous action in terms of Rule 16 of the rules of Native Chief's Courts then in existence.

Assuming that we felt ourselves justified in holding that Case No. 51/1915 decided the question of the heirship to Nselwana's estate, to be logical we would be bound to find that Case No. 13/1915 (which found as a fact that Mkonodaka was the heir) would operate as an estoppel to case No. 51/1915.

The case now falls to be considered on its merits.

While the finding of fact as to the heirship, in Chief's Case No. 13/1915, is convincing, it is nevertheless necessary to traverse the facts as laid in the evidence, in elucidation of ramifications which had their genesis in the days of the early Zulu kings in the unravelling and understanding of which the Court has been materially assisted by the arguments of Mr. *Shepstone* for appellant and Mr. *Walker-Wilson* for the respondent.

The evidence presented in this case goes to show that many years ago, during the reign of the Zulu king Mpande, a woman named Nozindhlovu fell in love with a man named Mshiselwa with whom she attempted to elope into Swaziland. Their plans were discovered and the woman was captured, but her lover escaped and fled to Swaziland.

Nozindhlovu was then summarily handed over to one Nselwana Zwane to be his wife, by the King's Prime Minister, Masipula.

Thereafter five sons were born, viz:—

(1) Mkonodaka (the father of appellant).
(2) Mqanjelwa, who died without issue.
(3) Matase (the father of respondent).
(4) Mankanyana } Twins.
(5) Pahlana }

Mkonodaka married one Tshingile, who was pregnant to another man at the time of her marriage. Their children were:—

(1) Madoda (illegitimate).
(2) A girl, and
(3) Key alias Phillip (appellant).

Mqanjelwa died without issue.

Matase alias Ndabankulu married and had two children, viz:—

(1) Muziwane (respondent) and
(2) Ntombana, a girl.

The conjugal condition of Mankanyana and Pahlana does not concern us.

The case before us is an appeal from the decision of the Native Commissioner, Vryheid, who, allowing an appeal to his Court against the judgment of Native Chief Sikova in favour of the appellant for 9 head of cattle, entered judgment for the respondent with costs.

The appellant's claim is for the return of certain nine head of cattle which he alleges were advanced by his (appellant's) father Mkonodaka, in the latter's capacity of general heir of Nselwana, towards the *lobolo* of respondent's mother Oka Bevula. These nine head of cattle consisted of six head left by Mqanjelwa on his death, which it is claimed were inherited by Mkonodaka as general heir and those head of the latter's own property. Appellant alleges that the arrangement was that these cattle were to be recovered out of the *lobolo* cattle of the first girl born to respondent's mother, who was Ntombana, and whose *lobolo* cattle have been received by respondent.

The respondent resists this claim and contends that appellant's father Mkonodaka was not the natural son of Nselwana and consequently was not entitled to succeed to the general kraal property. He claims that Mqanjelwa having died without issue, his own father Matase alias Ndabankulu became the general heir of Nselwana and that Mkonodaka had no right to deal with the estate cattle and is not entitled to claim their repayment to-day.

Chief Sikova found in favour of the appellant and awarded to him the cattle he claimed, i.e., nine head. The Native Commissioner reversed that judgment.

The crux of this case is, "Was the woman Nozindhlovu pregnant to her lover Mshiselwa when she was handed over to Nselwana or not?" If she was, and Mkonodaka was the child of that pregnancy, then naturally he could not be the general heir of Nselwana, and in that case the respondent, as the son of Matase, would be the heir to-day and as such is not liable for the return of the cattle claimed by appellant.

Now it seems to us that the evidence on the Record overwhelmingly supports the contention that Nozindhlovu was a virgin (or at least not pregnant) at the time she was given as wife to Nselwana. We have the evidence of the woman herself who declares that for a long time after her marriage (three years), she did not conceive and in consequence she consulted a medicine man who doctored her. It was only after treatment that she became pregnant and bore her first child, Mkonodaka, the father of appellant. Then we have the evidence of her half-brother Bone Similane, an old man 75 years of age, who testifies to the fact that Nozindhlovu was inspected by the women and found to be a virgin. He points out that if the girl had been deflowered a Mvimba beast would have been demanded from the family of her seducer, and slaughtered. This was not done and this omission is, we think, significant and strongly supports the virginity of Nozindhlovu at the time of her marriage. Others who support this are Mankanyana (a son), and Sikwayo, a nephew, of Nozindhlovu.

On the respondent's side the only person who gives contrary evidence on this point is Mfangana a cousin of the father of the parties. He was only a herd boy at the time Nozindhlovu married and would not be likely to know much about such matters. Moreover, he is probably biassed because it is on record that he has had unsuccessful litigation against Mkondaka.

The presumption of Mkonodaka's legitimacy is therefore very strong and the respondent has, in our opinion, failed to rebut it. It is a well-known fact that in the days of Nozindhlovu's girlhood the moral laws were very much more strictly observed than they are to-day and if her inspection by the women had shown her not to be a virgin, it is certain that some notice would have been taken of the fact and her people would not have failed to exact the customary " Mvimba " beast.

Then there is the very important matter of the ceremonial observed at the burial of Nselwana. It is a fixed Zulu custom that the heir to a deceased person shall be the one to cut the first sod of his grave and to stand at the head of the grave with the deceased's man's assegai. Nozindhlovu and Sikwayo both declare that the ceremony was performed by Mkonodaka. The only witness who disputes this is Mfangana who says that no such ceremony was performed because Nselwana perished of cold in the veldt and was buried on the spot. He says further that the usual ceremonies are not observed when a man dies in such circumstances, but we are not able to agree with him in this. There are occasions when, for superstitious reasons, bodies are not taken home for burial, e.g., in the case of deaths by drowning, lightning or in battle; but if a man perished of cold or by natural causes his body would, if it were humanly possible, be carried to his kraal for burial in the usual way.

There is reliable evidence that during his lifetime Nselwana recognised Mkonodaka as his heir and that the latter continued to exercise the functions of kraal head for years after his death. It was Mkonodaka who arranged the *lobolo* matters of his younger brothers Matase and Pahlana. He and his mother provided the beast which was slaughtered at the cleansing ceremony after his father's death, and he would also seem to have exercised paternal rights on the occasion of Ntombana's marriage when he performed the equivalent to the ceremony of " Hehlaing " by providing her with a black head cloth. Matase did not establish a kraal of his own till after his elder brother died. That Mkonodaka was recognised by his father as his heir is proved by the wording of the claim in Chief's civil case No. 51/1915 *Musiwane Swane* v. *Komdaga Zwane*, registered in the Vryheid Court, which reads as follows: " Plaintiff claims from the defendant the estate of his late father Ndabankulu (another name for Mselwane), who died and left his estate to his brother Komdaga (Nkomotaka)."

Having found that Mkonodaka was the legitimate first-born son of Nselwana and as such the general heir to his father's estate we must find that his son, the appellant, is entitled to the cattle he now claims. We are of opinion that the Native Commissioner was wrong in reversing the Chief's judgment, which must be restored.

The appeal is allowed and the judgment of Chief Sikova in favour of appellant for nine head of cattle and costs is restored. Respondent to pay costs of this appeal.

ZAGADA XULU v. YIBULALE XULU.

1930. *March* 27. Before Stubbs, President, B. W. Martin and F. W. Ahrens, Members of Court.

Native custom.—Divorce action.—False accusation.—Cleansing beast.—Sections 165, 166 *and* 126 *of the Code.—Absolution.—Costs.*

Facts: An appeal from the decision of the Native Commissioner at Vryheid.

Where plaintiff falsely accused by defendant's son of the crime of incest, refused to return defendant's kraal and sued for divorce on the ground that defendant drove her away from his kraal on the false accusations made and where it was argued that a cleansing beast should be killed by defendant before plaintiff could return to defendant; and where it was not clear from the evidence that defendant no longer persisted in the accusation the Native Commissioner granted absolution from the instance on which decision appeal was brought.

Held: That as appellant relied for a decree of divorce on the accusation made by the son of respondent and did not signify her willingness to return to respondent, her appeal for divorce must fail and the Native Commissioner's judgment must be upheld. Should she, however, return to her husband's kraal and thereafter adduce evidence to show that respondent declined to provide a cleansing beast to wipe out the wrong, there might be sufficient grounds for divorce.

In connection with divorce actions the Native Commissioner's attention was directed to observance of secs. 165, 166 and 226 of the Code.

For Appellant: Mr. *Randles*; for Respondent: No appearance.

Ahrens, Member of Court, delivered the judgment of the Court: Preliminary to discussing the merits of this appeal it would seem that no attempt has been made in the proceedings brought by the applicant against respondent to show that the clearly expressed terms of secs. 165, 166 and 226 of the Natal Code of Native Law which is operative in the district of Vryheid as an integral part of Natal have been complied with, nor have the provisions of Rule 6 (*a*) of the Courts of Native Commissioners in civil proceedings been observed.

For instance, in regard to the latter, there is no note on the Record to show that the summons was read and explained to defendant and that he was called upon to answer the claim. But as no objection was taken in the court below which refused the plaintiff's application for judgment it is not necessary to do more than direct attention to these defects in the hope that they will not recur.

At the suit of plaintiff (appellant in this Court) divorce is claimed from defendant (respondent in the appeal) on the grounds (to quote from the summons) of " ill-treatment and failure to render conjugal rights in that during winter in 1927 defendant believed in a false accusation reported by his son Ngemane Xulu alleging that he was an eye-witness to a misconduct between plaintiff and another native named Mtabate Xulu, a close relative of defendant from which allegation I was debased as defendant's wife and have lived apart from him."

The Native Commissioner after trying out the case granted absolution from the instance with costs.

It would appear from the evidence that the Chief found defendant guilty of having failed to take action when the accusation was made of the wife having committed adultery with someone. Beyond having dealt with a case between defendant and his wife based on desertion he has dealt with no other issue between them. He disclaims any knowledge of a case wherein " Defendant " charged " Plaintiff " with assault. There would appear here a confusion in the description of the parties.

On the action for desertion the plaintiff was ordered by the Chief to return to defendant's kraal; she, however, failed to comply with this order and removed to the kraal of her guardian Silwane.

Silwane's evidence is to the effect that the Chief warned plaintiff to return to defendant but on a later occasion the Chief required her to return to his (Silwane's) kraal.

Plaintiff in her evidence states that her husband, the defendant, had accused her on information received from Magemegeme of having committed adultery, and in consequence she was to go away and he wanted his cattle back. She states that Ngemane, son of defendant, also accused her of having committed adultery. She alleges that the defendant and his son Magemegeme were proceeded against by one Mtabate, the man with whom she is alleged to have mis-conducted herself, and judgment in the Chief's Court was given against them. The defendant in answer to this states that after she had deserted him and he had taken steps to secure her return to him he was informed that an action was pending against him in the Court of the Chief Lelengopondo for having made the charge that she had committed adultery. When the case in due course came before the Chief he intimated that the issue with which he was concerned was one of her having deserted his (defendant's) kraal and the judgment was given in his favour and she was ordered to return to him forthwith. She has never returned. He admits, however, that a case was tried by the Chief in which Matabate Xulu sued his son Magemegeme, presumably in connection with the charge of adultery referred to by the plaintiff, and that his son lost the case. He denies most emphatically that he at any time accused her of having committed adultery with anyone, and the only reason he can ascribe for her leaving his kraal was the trouble between her and his son Magemegeme. From the evidence of Mazamela Sitole, the official witness to the Court of the Chief Lelemgopondo, it would appear that in dealing with the case brought by Mtabate against defendant and his son Magemegeme, the Chief found against the latter and exculpated the former. He is emphatic that he came to the Native Commissioner's office to record a judgment not against defendant but his son Magemegeme.

Peter Hendrik Tredoux, Interpreter-Clerk in the Native Commissioner's office remembers a case between Mtabate Xulu and Zibulale Xulu (defendant) being reported at that office and has produced the Record thereof. He states that Mazimela Sitole was the man who reported the case. The Native Commissioner would appear not to have accepted this evidence as representing the true position.

From the summons and evidence it seems to me that the plaintiff in her action for divorce relies on the accusation by respondent's son of her misconduct with Mtabate Xulu which in the circumstances amounts to incest, an unthinkable crime in the eyes of the Natives.

The son Magemegeme who was responsible for making the accusation of plaintiff's immoral relations with Mtabate has been appropriately dealt with by the Chief Lelengopondo.

It is signified that on her return defendant is willing to purge the wrong by killing a beast for the cleansing ceremony, which as a rule occurs at the kraal of the person responsible for the insult; we do not think he could be reasonably expected to do more by way of atonement for his son's wrong, nor do we think that plaintiff has succeeded in doing more than establish this and the son's imputation of immoral relation with Xulu as the sole reason for divorce. Substantially the Native Commissioner has found this to be the position. He says in his reasons for judgment the charge was not made by the husband (defendant) but by his son Magemegeme and defendant cannot be blamed for having taken steps to inquire whether or not his son's allegations were well founded. He admits the necessity in the circumstances for the killing of a cleansing beast by the defendant at his kraal but properly this can only be done when plaintiff signifies her consent to return to him. If after the return the defendant fails to provide a cleansing beast the woman may have sufficient grounds for divorce. This view is supported by the evidence of Ndhlovu who claims to a wide knowledge of Zulu laws and customs and corroborated by others. The Native Commissioner goes on to say that the Court on the evidence before it would have been justified in giving judgment for defendant instead of one of absolution but it was thought that she might possibly return to her husband's kraal and if thereafter she adduced evidence to show that defendant declined to provide a cleansing beast to wipe out the wrong there might be sufficient grounds for a divorce.

We are not called upon to decide this point as it is not before the Court, but on the other grounds we see no reason to differ from the finding of the Native Commissioner.

The appeal is dismissed with costs.

1930. *March* 31. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of Court.

Section 203 of the Schedule to Law 19 of 1891.—Abuse.—Defamation.—Application of common law or Native law.

FACTS: An appeal from the decision of the Native Commissioner at New Hanover. Where in the Chief's Court appellant was awarded £2 on a claim for £20 being damages sustained in that appellant alleged that respondent called him a dog in the presence and hearing of others and where on appeal to the Native Commissioner the Chief's judgment having been sustained, the matter was brought in appeal to this Court; and where it was argued that in deciding matters involving actions for defamation between Native and Native, principles of common law to the exclusion of Native law should be applied, notwithstanding the fact that the Native Commissioner dealt with the matter in terms of sec. 203 of the Code and where the Court was asked to hold that the innuendo, "you are a mean and deceitful man, you are sly and underhand," should be read into the words "you are a dog" although no such innuendo has been set up in the summons.

HELD: That in the absence of an innuendo in proper form and in the absence of evidence suggesting the innuendo which the Court was asked to accept as the one correctly reflecting the meaning of the words used, and as The Native Chief in the first instance could only decide the case in terms of Native law, the Court had to decide by the Code whether the words used were defamatory.

HELD, further: That as the words complained of were used under provocation in the course of an altercation and not in reference to the character or parentage of the individual they could only amount to abuse and are not actionable.

The appeal was upheld with costs.

For Appellant: Mr. *Howard*; for Respondent: Mr. *Randles*.

STUBBS, P.: The action is one for slander based on the allegation that respondent in the presence and hearing of others at the kraal of Mangceka was called a dog by appellant.

The Chief before whom the case came in the first instance awarded damages in the sum of £2 against appellant who appealed to the Court of Native Commissioner, New Hanover, who sustained the Chief's judgment.

Appeal is now brought against the latter judgment.

On the application of Mr. *Howard* (for appellant) to hand in grounds of appeal in amplification of the notice of appeal the preliminary point has arisen whether at this late stage he is entitled to be heard on the grounds of appeal without being deprived of costs should the appeal succeed.

Mr. *Howard* has explained that the grounds of appeal were filed with the clerk of the Native Commissioner's Court timeously, but through the oversight of that officer a copy of the grounds was not furnished to the respondent. Mr. *Randles* for respondent while admitting that the late filing of the grounds of appeal does not take him by surprise, nor is prejudice occasioned, he objects to costs being awarded should the appeal succeed, on the ground that he has not been notified timeously of the grounds relied upon.

Rule 9 (1) of the Native Appeal Court Rules places the obligation of serving notice and grounds of appeal on the party noting the appeal, which may be done in one of the two following ways, viz.: It may be served free of charge, by the party who noted the appeal, in person, by delivering to the other party personally in the presence of a witness, or, at the request of the party noting the appeal, such copy shall be served by the messenger of the court concerned upon prepayment by such party, of the messenger's fees for service.

Mr. *Howard* has failed to satisfy this Court that this procedure has been followed. As stated Mr. *Randles* has admitted that he has not been taken by surprise or prejudiced in any way.

That being so if the appeal succeeds we feel we should not be justified in depriving the appellant of the costs on appeal, but would certainly not be disposed to grant costs on the higher scale as asked for by Mr. *Howard*.

Mr. *Randles* in the course of argument has raised several rather novel points.

He contends that this matter falls to be dealt with entirely by the common law and not by the Code, relying on the case *Hawes* v. *Nomahowick* (N.H.C. 1913) and the practice, he insists, of the Native High Court applying, in deciding all matters involving actions for defamation between Native and Native, principles of common law to the exclusion of Native law. While there can be no doubt that in the case quoted common law has been applied, equally there can be no doubt the nature of the action and the circumstances rendered appropriate the application of that law. But I cannot read into the remarks of the learned Judges an intention to lay down the inflexible rule referred to by Mr. *Randles*,

nor do I think it could be so because since that case a number of decisions have been given by the same Court indicating the contrary.

Mr. *Randles* has said that the common law was intended to and must apply in this case and he says that although no innuendo has been set out in the summons, because the evidence supports an innuendo the Court must hold the following innuendo, which he now asks it to accept, to have been established: " You are a mean deceitful man, you are sly and underhand," and he says the innuendo supported by the evidence establishes the defamatory nature of the words: " You are a dog " or " I am not talking to a dog." If as Mr. *Randles* will have it the matter has been dealt with at common law, would an exception to the summons in its present form as disclosing no cause of action succeed? I do not think there is the slightest doubt that the answer must be in the affirmative. If Mr. *Randles* comes to this Court and asks us to decide the appeal upon common law principles and, in the absence of an innuendo in the summons, to say the innuendo he has furnished contains the meaning which the by-standers gave to the epithet " U 'inja " I can only reply that this would be a mode of procedure unique in the annals of our Courts of law.

Mr. *Randles* cannot have it both ways. If he takes his stand, as he has done, on the common law he must stand or fall by the result. To pursue his argument yet a little further, to show how incapable it is of logical application: the case was tried by the Native Chief in the first instance in terms of the only law which by statute he is empowered to administer—Native Law—and his decision, appealed to the Native Commissioner's Court, was upheld. Can it be said that the Native Commissioner in determining whether the Native Chief's decision was a correct one at Native law applied a system of law in many respects foreign to Native law concepts of defamation?

The Native Commissioner distinctly says in his reasons for judgment that he has dealt with the matter in terms of sec. 203 of the Code. In the absence of an innuendo in proper form, in the absence of evidence suggesting the innuendo we are asked to accept as the one correctly reflecting the meaning of the words used, we are thrown back on the bald utterance " You are a dog " or " I am not talking to a dog " and we must decide whether by the Code these words are *per se* defamatory, and if they are defamatory, whether in the circumstances in which they were uttered respondent was entitled to succeed?

This leads to a consideration of the evidence and the point raised by Mr. *Randles* that the evidence of appellant's witnesses as to provocation should be rejected.

There is nothing on the Record to show that the Native Commissioner rejected that evidence. As a matter of fact not a single reference by the Native Commissioner is made in his reasons for judgment that he has believed or disbelieved the evidence, and as that evidence has been unassailed it must be assumed that it was not rejected.

To me this presents little difficulty. It seems that what we are required to decide is whether the words " I will not talk to a dog " in retort to " I am not talking to a drunkard " constitute language that may reasonably be taken to have been a malicious statement alleging evil conduct on the part of respondent within the meaning of sec. 203 of the Code. If we decide in the affirmative the appellant must fail. In deciding this point recourse must be had to the evidence on essentials. The evidence of Lugombe Zondi, Headman to the Chief Zwelake, whom he sent to represent him at the trial in the Native Commissioner's Court is illuminating. He says: " It is also a serious thing to call a man a drunkard if he is not actually drunk at the time . . . . . The two most serious forms of abuse to the Native mind are:—(1) To call a man msunu ka nina; (2) To call a man an Inja (dog) "; so that of the two insults this witness puts (1) as the greater, and yet in respect of those words it has been held in the case *Duba Gabela* v. *Setshotshoba* (N.H.C. December 17, 1925), that they amount to no more than low abuse. This seems to dispose of any doubt that what is regarded as a very grave, a very objectionable insult, amounts only to low abuse. It cannot therefore be logically argued that the lesser one of calling a man a dog in retort to " I am not talking to a drunkard " the complainant (respondent), having been the aggressor, is a malicious statement alleging evil conduct constituting defamation. But suppose it be argued, as it has been argued, that (2) is in the eyes of the Natives the more opprobrious of the two and (1) is not and (2) is capable of a defamatory meaning, are they actionable in the sense in which they were used and in the circumstances in which they were used? In this respect the evidence of the Native Court messenger is interesting. He says: " If I were called a dog I would retaliate by calling the speaker a dog, also if I heard a man called a dog I would not think anything of it unless I knew the mind of the man who called him a dog."

He admits in cross-examination that a dog has a lower nature and describes some of the habits to which it is prone but equally it has higher instincts, noble instincts.

To call a man a cat or a hyena would, if the argument of counsel for respondent were to be carried to its logical conclusion, be no less offensive. By comparison I should think it would be more offensive. A cat has stronger thieving propensities than a dog, a hyena prowls by night. It is stealthy, sly, scavenges the kill of other denizens, and yet if either of these terms were levelled at another in similar circumstances they would be regarded as being no more than abuse.

It has been stressed in evidence and in argument that the dog is promiscuous as well as indiscriminate in its sexual amours, to show, I suppose, that it is an object of contempt, but this after all is no less marked in the two animals taken at random for comparison. The cat is disturbingly vocal in its moments of ecstacy, similarly the hyena whimpers. So that viewed from whatever angle I think the dog less an object of contempt than either of the other two animals, even in the eyes of the Native, and if either epithet were used in the same sense as appellant called respondent a dog at most it could only amount to abuse—abuse too that has to be off-set by the language of the aggressor—" I am not talking to a drunkard."

While not doubting that under certain circumstances the use of the term " Inja " may be defamatory I consider that in this case it would be going very far indeed to hold that the term is actionable and that damages can be awarded.

It is a very common occurrence for one white man to call another a " bastard " or a " bugger "; both terms would be actionable if the words were used in reference to the character or parentage of the individual, but where the terms are used in the course of an altercation, no Court would in the absence of special circumstances award damages as the words used probably would be mere abuse. The fact that people who hear the remarks will laugh at the party abused if he does not take action will not affect the position—anyone with spirit will take action with fists or sticks and failure to take such action might mean that the party abused is afraid of being worsted in the fight, but his failure to knock a man down cannot make the words used defamatory and so give rise to an action for damages.

The appeal is upheld with costs.

MARTIN, Member of Court: I concur.

AHRENS, Member of Court: I merely wish to add that the evidence of Mangceka the kraal head, who was called by the plaintiff, is important when he states in cross-examination that before plaintiff stood up he had not been taking any notice of them. This is an admission that he does not know what took place between the parties before that.

SIMON BHEKISISA NGWANE v. JOSIAH MSOMI.

1930. *March* 31. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of Court.

Interpretation of Mission Reserve Regulations Government Notice No. 621 of 1919.—Validity of agreement.—Right of tenant to dispose of proceeds of land allotted.—Costs.

FACTS: An appeal from the decision of the Native Commissioner at Umzinto.

Appellant, a kraal head, rented certain lands in the Amahlongwa Mission Reserve on which lands he planted sugar cane. In 1927 appellant entered into an agreement with respondent that the latter should purchase the cane crop from him which set out that appellant was the owner of the cane and that he agreed to dispose of all rights, title and interest in the sugar cane to the respondent for the sum of £80 which amount together with rents due and rental in respect of tenancy had to be paid over to appellant in instalments. Subsequent to the agreement the Inspector of Mission Reserves notified respondent that the appellant had no authority to let land on the Reserve and that the agreement could not be recommended under sec. 14 of the Mission Reserve Regulations published under Government Notice No. 621 of 1919. The respondent was further warned not to take up occupation or to trespass on the allotment in question. The matter was submitted to the Chief Native Commissioner who replied that the Department for Native Affairs was not interested in the dispute. In July, 1929, respondent having obtained a judicial order interdicting certain agents from paying over to appellant any of the proceeds of the cane in

question, the amount due by the agents in respect of the cane was paid over to the magistrate at Umzinto. Respondent before the Native Commissioner sought and obtained an order to uplift this sum of money against which order the appeal was brought.

The point for decision was whether or not the respondent was entitled to enter into an agreement in view of the provisions of secs. 13 and 14 of the Mission Reserve Regulations published under Government Notice No. 621 of 1929, and whether these regulations rendered the agreement a nullity.

Held: That the effect and intention of the Mission Reserve Regulations Nos. 13 and 14 of Government Notice No. 621 of 1919 are merely to prevent outside and unauthorised Natives from squatting upon or using the Reserves for grazing or cultivation purposes and these regulations in no way preclude an authorised tenant from disposing of the products of the land allotted to him.

Held, further: That the agreement was a valid one and that therefore the appeal was dismissed with costs.

For Appellant: Mr. *R. I. Darby*; for Respondent: Mr. *J. R. McSwaine.*

Martin, Member of Court: The respondent is a native kraal head resident in the District of Ndwedwe.

The appellant is also a kraal head whose kraal is in the Amahlongwa Mission Reserve, in the Umzinto District. He rents certain lands on that Reserve for which he pays a yearly rental of £1 to the Natal Native Trust.

On the land rented by appellant has been planted an area of sugar cane five or six acres in extent. The first crop of cane was disposed of by appellant to Messrs. Crookes Bros., and was duly cut and gathered in by that firm.

At the end of 1927 the appellant asked respondent to purchase the cane from him. After some weeks of negotiation a written agreement was drawn up in due form and was signed by the parties before a Commissioner of Oaths. That agreement was dated 6th February, 1928.

Under this agreement the appellant, after setting out that he was the owner of the cane in question and that there was no objection to the transaction on the part of the Mission Reserve authorities, agreed to dispose of all his rights, title and interest in the sugar cane to the respondent for the sum of £80 payable as follows:—

£20 on the execution of the agreement;

£20 after the cutting and gathering in of the first crop;
£20 after cutting and gathering in of the second crop, and
£20 on cutting and gathering in of the third crop.

It was further agreed that the respondent would pay to the Inspector of Mission Reserves, on behalf of the appellant, a sum of three pounds (£3) due by the latter as rent, which amount was to be deducted from the first instalment due under the agreement. Respondent further undertook to pay to the Mission authority on behalf of the appellant, the rental of one pound (£1) per year in respect of his tenancy, during such period as respondent enjoyed the possession and occupation of the land on which the sugar cane was growing.

The first instalment of £20 was duly paid to appellant as agreed. Apparently the three pounds (£3) referred to above was included in this sum and was paid by appellant direct to the Receiver of Mission Reserve Rents.

Prior to the signing of the agreement the appellant apparently made no mention of any claim of Messrs. Crookes Bros., who had gathered in the previous crop, but appellant stated that they could have no claim on the land. Respondent, however, instructed his attorney to communicate with Messrs. Crookes Bros., who replied that they had an account against appellant for £14 4s. 3d. in respect of cultivation by them of his cane lands. The respondent, through his attorney, requested Messrs. Crookes Bros. to deduct that amount from the value of appellant's cane.

At some time subsequent to the agreement the Inspector of Mission Reserves notified someone (presumably the respondent or his attorney) that the appellant had no authority to let land on the Reserve and in consequence his agreement could not be recommended. The Inspector quoted sec. 14 of the Mission Reserve Regulations published under Government Notice No. 621 of 1919 which reads as follows, viz.:—

> "Any person who shall cultivate land not allotted to him, or who shall occupy, trespass upon, or use any land beyond the appointed boundary of his allotment without the approval of the Chief Native Commissioner first had and obtained, shall be deemed to have committed a breach of these Regulations; provided that it shall be lawful for any person who has obtained the written consent of the Inspector to allow any relative or friend residing on the Mission Reserve to cultivate his allotment for one year."

In the same communication the Inspector warned the person to whom his letter was addressed that he must not take up occupation or to trespass on the allotment in question.

On the 22nd November, 1928, the Inspector of Locations again informed the respondent's attorney by letter that the respondent's interest in the Reserve could not be recognised. He said further that the appellant owed £1 for rent which was payable before the end of the then current month. He also pointed out that though he personally was opposed to outside Natives having any interest in the Reserve the appellant had the right to appeal to the Chief Native Commissioner for his approval of the agreement. Acting on this suggestion the respondent's attorney in communicating with the Chief Native Commissioner, set out the essentials of the agreement between the parties, and the Chief Native Commissioner replied that the agreement was purely a private matter between respondent and appellant, and his Department was not interested in it.

In July, 1929, the respondent applied for and obtained a judicial order interdicting Messrs. Crookes Bros. from paying over to the appellant any of the proceeds of the cane in question. As a result of this interdict Messrs. Crookes Bros. paid into the hands of the magistrate, Umzinto, the sum of £42 16s. 4d. being the amount due by them in respect of the cane now in dispute.

It is in respect of this money that the respondent sought a declaration of right or an order to uplift. In addition he claimed £50 as damages.

The Native Commissioner granted the order prayed as regards the £42 16s. 4d. but disallowed the claim for damages and it is this judgment that is in appeal before us.

Since the appellant does not dispute the validity of the agreement itself the only question to be decided by us is: "Would the intervention of the Mission Reserve Inspector, or the Mission Reserve Regulations render the agreement a nullity?"

This point requires discussion. It will be noticed that paragraph 4 of the preamble to the agreement reads as follows:—

> "And whereas the purchaser desires all the seller's right, title, and interest in the said land and sugar cane for the next four reaping seasons."

The first paragraph of the main agreement contains these words:

> "The purchaser shall pay to the seller the sum of £80 (eighty

pounds sterling) as a rental or as consideration agreed upon for the cession and transfer to him of all the seller's right, title and interest in the said land growing cane," etc., etc.

The point to be decided is whether or not the respondent was entitled to enter into the agreement in view of the provisions of secs. 13 and 14 of the Mission Reserve Regulations. Regulation 14 has already been quoted. Regulation 13 reads as follows:—

"No person not a resident on a Reserve may cultivate land or depasture cattle on such Reserve without the permission of the Chief Native Commissioner."

The effect and intention of these two regulations, is, in my opinion, merely to prevent outside and unauthorised Natives from squatting upon or using the Reserves for grazing or cultivation purposes.

They in no way preclude an authorised tenant from disposing of the products of the land which he is entitled to cultivate.

It has been argued that by purporting to dispose of his rights and title to the land, in addition to the crops growing thereon, the appellant exceeded his rights to such an extent as to render the agreement a nullity. I cannot endorse this argument. Such was not the appellant's intention nor can such an intention be read into the argeement. It is quite plain that it was the crop of sugar cane and the right to go on to the land to cultivate and reap it that was acquired by respondent. There is nothing in the regulations to preclude the appellant from ceding that right, nor is there anything to prevent the respondent from acquiring that right. As has been stated in argument, the sale of cane crops to millers and others by tenants on the Coastal Reserves is a common practice. In most cases the tenants enter into agreements with the millers wherein the latter agree to plant, cultivate, and reap cane and pay to the tenants the profits at the end of each season. The right to do this has apparently never previously been challenged by the Inspectors and it is shown by the letter of the Chief Native Commissioner dated the 18th February, 1929, that the Native Affairs Department has offered no objection to the practice.

I am of opinion that this appeal must fail and that the judgment of the Native Commissioner should be upheld with costs.

AHRENS, Member of Court: I concur. To my mind we are here not so much concerned with the question as to whether or not the

Native Commissioner was wrong in holding that the agreement relied upon by the plaintiff was valid and binding in law, as the claim is one for a declaration of right or an order of Court to uplift the sum of £42 16s. 4d. which amount purports to represent the balance of the first year's crop of sugar cane.

There is no doubt that the parties at the time when the agreement was executed were *ad idem*.

The plaintiff has fulfilled his part of the contract in so far that he paid the first instalment of £20 and that he tendered the £1 yearly rental, which was returned to him by the Inspector of Locations on the 18th April, 1929. There is nothing on record to show who actually paid this amount. Was it the defendant who paid it? If so, did he mean to release himeslf by waiver, or a contract the legality of which had then not been tested in a court of law? Anson on *Contract* (Eleventh Ed. at page 341) says, " A release is a waiver, by the person entitled, of a right of action accuring to him from a breach of a promise made to him." At the time of the tender of £1, in the absence of a notification by the defendant to plaintiff, that the former had found out that the contract was unenforcable, the defendant impliedly acknowledged the existence of the contract. The plaintiff was induced by the defendant's promise to part with something which he might have kept viz.: the £20, payment of the first instalment under the contract, and the defendant obtained what he desired by means of that promise. In *Haigh* v. *Brooks* (Anson on *Contracts*, Eleventh Ed. at page 91) it was held where the consideration of a promise to certain bills of a large amount was the surrender of a document supposed to be a guarantee and the guarantee turned out to be unenforceable, that the worthlessness of the document was no defence to an action on the promise.

The plaintiff paid the £20, being in respect of the first instalment on this deal, on the 6th of February, 1928 and he duly tendered the annual rental due, on the 15th April, 1929, in terms of clause 4 of the agreement.

The defendant's solicitor by letter addressed to plaintiff's solicitor, dated the 13th November, 1929, states that he again tenders the £20. There is nothing on record to show that he had previously tendered to £20. Is he referring to the letter he wrote to Messrs. Crookes Bros. on the 11th October, 1929, where he says, " Although interest is unknown in Native law we have advised our client, for the sake of peace, to pay a reasonable sum as interest on this money and, of course, to repay the principal "?

The Record before us shows that the first and only tender was made on the 13th November, 1929, i.e., over nineteen months after the execution of the contract and since the issue of summons.

The defendant by his conduct is therefore barred by way of estoppel. Powell on *Evidence* (Tenth Ed. at page 385) puts it thus: "An estoppel is a bar which the law sometimes puts in the way of one who is endeavouring to maintain the contrary of that which he once asserted in words, or unequivocally implied by his conduct."

STUBBS, P.: I concur. At first blush this matter would appear to be involved but on a closer study of the contract and the facts the issue is, to me, simple.

The respondent entered into an ordinary business contract whereby he bought from the appellant, the crops on the land in question for a period of four years, and the contract was reduced to writing in due form.

The appellant according to evidence, which is uncontradicted, suggested the agreement and sometime after the contract had been signed, instructed his lawyer to notify Messrs. Crookes Bros. that the agreement was a nullity (Exhibit 1) apparently on the ground that the Superintendent of Locations had refused to confirm the agreement, or rather to recognise respondent's claim under the agreement (Exhibit E). The Superintendent's ruling was not, however, final (Section 4 (*a*) Government Notice No. 621/1919) and the Chief Native Commissioner to whom appeal was made, ruled (Exhibit D) that the matter was a purely private agreement between the parties and not one in which the Department could interest itself. Official sanction had therefore not been refused, or perhaps one may put it, that the Chief Native Commissioner ruled that the contract did not need his approval.

There can be no doubt that the defendant has made a bad bargain—he has parted with cane worth perhaps £100 for £20, and doubtless that is the reason for his attempted repudiation. He has, however, retained the £20 for the first year's rent and has not offered to return it on repudiating the agreement. There is at any rate nothing on record to show that the repudiation was notified to plaintiff.

The agreement is not one whereby rights to land are permanently assigned. The crops only have been purchased for a period of four years and at the end of that time the defendant regains

possession of the land, and presumably any cane that is then in existence.

The contract, it is true, refers to right, title and interest in the said land and sugar cane, and in paragraph (3) it is stipulated that the purchaser shall not " sell, cede, assign, or sub-let the property," but there is no doubt as to the actual intention of the parties, viz.: to sell the crops only for the next four reaping seasons.

I can find nothing in Government Notice No. 621/1919 or the Act, that debars the parties from entering into the agreement.

The appeal is dismissed with costs.

GIJIMA MAPUMULO v. NKANTOLO TSHANGE.

1930. *April* 1. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of Court.

Competency of guardian to act for ward. — Amendment of summons.—Irregularity.—Exception and objection, Section 8, Government Notice 2255 of 1928.- Costs.

FACTS: An appeal from the decision of the Native Commissioner at Pinetown.

Where in appeal to the Native Commissioner's Court it transpired that the respondent was not the same person in whose favour judgment was given in the Chief's Court, but his guardian and nephew, and where exception having been taken on this irregularity, appellant's attorney applied for an amendment of the summons substituting the original respondent before the Chief as respondent before the Native Commissioner's Court on the grounds that such an amendment would not prejudice any party, and where the respondent objected to such an amendment and the Native Commissioner refused the application and dismissed the appeal with costs; and where as neither in the Chief's Court nor in the Native Commissioner's Court any evidence had been led on the point of competency of the ward or guardian to appear in the relative courts below, appellant applied for the case to be remitted to the Native Commissioner to lead full evidence as to who actually conducted the case in the lower court.

HELD: That as the Native Commissioner did not deal with the matter fully in terms of sec. 8 of the Chief's Court Rules and in the absence of evidence in both the Native Commissioner's Court and the Chief's Court as to who conducted the case in the Court of first instance, the matter was referred back to the Native Commissioner to lead evidence on that point. Costs of appeal were made costs in the cause on the merits.

The Court was of opinion that if the ward was competent to sue in the Chief's Court it followed that he was competent to appear and defend the appeal in the court below and if that was the position then the Native Commissioner correctly refused the application.

For Appellant: Mr. *Fowle;* for Respondent: Mr. *Becker.*

STUBBS, P.: The sole point for consideration here is, did the action before the Chief involve the same parties and the same subject-matter as the one brought in appeal to the Native Commissioner?

The summons, page one, sets out the parties as Nkantolo Tshange and Gijima Mapumulo, plaintiff and defendant respectively in the action before the Chief Binananda, Pinetown.

On the 19th of July, 1929, Gijima Mapumulo, appellant in the court below and appellant in this Court, made a statement at the Court of Native Commissioner, Pinetown, in which he noted and stated the ground of his appeal against the judgment of the Chief in favour of Nkantolo Tshange. When the matter in due course came before the Native Commissioner for hearing Mahleka Tshezi, the Induna of the Chief Binananda appeared to give evidence in explanation of the Chief's judgment and he says: "I remember the case when Matitima Tshange was plaintiff and Gijima Mapumulo defendant. Nkantolo has no judgment in the Chief's Court against Mgijima. Matitima is nephew of Nkantolo who is guardian of Matitima."

It is clear then that Nkantolo Tshange is the guardian of Matitima Tshange who was the plaintiff in the action against Gijima Mapumulo in the Court of the Native Chief. There he apparently brought the action unsupported by his guardian who in the Appeal Court below was cited and stood in the substantive position of respondent without any reference having been made to the effect that he was cited and appeared either to assist Matitima Tshange in his representative capacity as guardian or substantively as respondent in his behalf. If Matitima Tshange was competent

to sue Gijima Mapumulo in the Native Chief's Court it follows that he was competent to appear and defend the appeal in the court below without the assistance of his guardian Nkantolo Tshange. And if that was the position, the Native Commissioner rightly refused Mr. *Fowle's* application for the insertion and substitution of Matitima as respondent in place of Nkantolo.

In the absence of evidence in both the Chief's and Native Commissioner's Courts on the point of competency which was not raised in the court below and has not been made a ground of appeal here, we are not in a position to say that the Native Commissioner exercised a wrong discretion in refusing Mr. *Fowle's* application, but in view of the application of Mr. *Fowle* for the case to be remitted to the Commissioner to lead full evidence as to who actually conducted the case in the Chief's Court, due to further evidence having become available to show that Nkantolo Tshange himself brought the case in the absence of his ward, and more especially on the ground that in any event the Commissioner should have dealt with the matter fully in terms of sec. 8 of the Chief's Civil Court Rules, the matter is referred back to the Native Commissioner's Court in terms thereof to be brought within one month, costs of appeal to be costs in the cause on the merits.

AGNES MSIMANGO v. LETTIE SITOLE.

1930. *April* 2. Before Stubbs, President, B. W. Martin and F. W. Ahrens, Members of the Court.

Slander.—Action for damages.—Provocation.—Absence of evidence.—Rule 26 (*a*) *Government Notice No.* 2253, 1928.—*Costs.*

Facts: An appeal from the decision of the Native Commissioner at Pinetown.

Where the action was one for damages for alleged slander, brought before the Chief who awarded damages against defendant and where the Native Commissioner notwithstanding the words used being *per se* actionable, reversed the judgment brought in appeal to his Court without any evidence having been called to contradict the evidence of the appellant, that the vocal onslaught was unprovoked and that there was no quarrel; and where the

Native Commissioner in terms of Rule 26 (*a*) did not clarify the issue by ascertaining its nature.

HELD: That as there was no evidence to show that appellant gave any provocation to respondent for the words complained of the Native Commissioner was wrong in reversing the Chief's judgment.

The appeal was sustained, the judgment of the Native Commissioner set aside and the Chief's judgment restored with costs.

As regards observance of Rule 26 (*a*) by Native Commissioners, the Court expressed the view that it was desirable that Native Commissioners should appreciate the importance of clarifying the issue by ascertaining, particularly where the parties are unrepresented by counsel, the nature of the issue in terms of Rule 26 (*a*) in order that the evidence might be directed to a solution of the issue which would be of material assistance and guidance in the Court of Appeal.

For Appellant: Mr. *Fowle*; for Respondent: Mr. *Burchell* (instructed by Mr. E. F. Willcocks).

STUBBS, P.: The action is one for damages for alleged slander which in the first instance was brought before the Chief Mgijimi who awarded the plaintiff, now appellant, damages against defendant, now respondent, for £2 and costs.

This judgment was brought in appeal to the Court of Native Commissioner, Pinetown, who upheld the appeal.

It is noticed that the appellant in the court below was represented by Mr. Attorney Willcocks and that respondent appeared in person. The summons appears to have been read to respondent and the plea cryptically states, "Appeal resisted."

In the absence of any evidence by respondent it would have been better had the plea been couched in language making it clear on what defence respondent relied. To say merely "Appeal resisted" is of little or no value and raises no issue.

As indicated in previous decisions of this Court, it is desirable, without laying down anything more definite than is prescribed in Rule 26 (*a*), that Native Commissioners should appreciate the importance of clarifying the issue by ascertaining, particularly where the parties are unrepresented by counsel, the nature of such issue in order that the evidence may be directed to a solution of the issue which would be of material assistance and guidance to this Court in case of appeal.

All we are called upon to decide in this matter is whether the words complained of were in fact used by the respondent in the circumstances stated? If they were so used, appellant must succeed. If not, she must fail.

I at once reject the view of the Native Commissioner that " the words complained of were used in a quarrel the entire matter being the outcome of a storm in a tea-cup."

The appellant alleges that she was gratuitously attacked at her kraal in the presence and hearing of one Nxumalo, by respondent who accused her of having committed adultery with her (respondent's) husband, of being a prostitute at Pinetown and as suffering from a venereal disease. She (respondent) lifted her clothes, showed her private parts and said of appellant that she could not do the same because she was suffering from a venereal disease.

Nxumalo the only other witness called in the case substantially corroborates the appellant.

Beyond an admission by appellant that she was very angry and asked respondent why she abused her, there is not a tittle of evidence to show that she gave any provocation to respondent for the words complained of. It was perfectly natural for appellant to have been very angry at the serious accusation levelled at her by respondent. There is evidence that some beer had been drunk at appellant's kraal, but despite this there is nothing to show that appellant made use of and directed any insulting remarks to respondent.

I am at a loss to understand how the Native Commissioner on the evidence could have come to the conclusion that there had been a heated quarrel and that the words were used in the form of vulgar abuse uttered on the impulse of anger.

Without any evidence having been called to contradict the evidence of the appellant in the court below that (*a*) the vocal onslaught was unprovoked, (*b*) there was no quarrel, the Native Commissioner allowed the appeal and reversed the Chief's judgment.

The words complained of are *per se* actionable and the Native Commissioner was wrong in holding otherwise.

The appeal is sustained and the judgment of the Native Commissioner set aside and that of the Chief in favour of the respondent for £2, restored with costs.

Martin, Member of Court: I concur.

Ahrens, Member of Court: I concur.

1930. *April* 3. Before STUBBS, President, B. W. MARTIN and F. W. AHRENS, Members of the Court.

Native customary union.—Divorce on grounds of ill-treatment and malicious desertion.—Sections 168 *and* 169 *of the Schedule to Law* 19 *of* 1891.—*Absolution.—Costs.*

FACTS: In the court below an action for divorce on the grounds of ill-treatment and malicious desertion was brought by plaintiff against her husband. The Native Commissioner granted the divorce, allowed applicant to have the custody of the children and made no order as to the return of the *lobolo* on remarriage of the applicant, notwithstanding that in the face of conflicting evidence the misdeeds of the husband had not been proved in terms of sec. 168 of the Code. The Native Commissioner also neglected to observe sec. 169 of the Code.

HELD: That as the evidence led in the case was not sufficiently strong to justify the granting of the decree sought the judgment should have been absolution from the instance, and as the action against appellant has not been proved the proviso to sec. 168 of the Code should not have been applied.

The appeal was sustained and the judgment of the lower court was altered to one of absolution from the instance with costs in both Courts.

The Native Commissioner's attention was further directed to the peremptory terms of sec. 169 of the Natal Native Code.

For Appellant: Mr. *Becker* (instructed by Messrs. Romer, Robinson & Catterall); for Respondent: In person.

MARTIN, Member, delivered the judgment of the Court: The respondent in this case was plaintiff in the Court of the Native Commissioner, Inanda, and claimed a decree of divorce against her husband (appellant) on the grounds:—

(1) Ill-treatment, and

(2) Malicious (wilful) desertion.

The divorce was granted as prayed, and the Commissioner's judgment is now before us in appeal.

After careful consideration of the evidence led in the case we have come to the conclusion that it was not sufficiently strong to justify the granting of the decree sought. The evidence does not,

in our opinion, establish either of the grounds on which the respondent relied.

The appeal is therefore sustained and the judgment of the lower court altered to one of absolution from the instance, with costs in both Courts.

The Native Commissioner's attention is directed to the peremptory terms of sec. 169 of the Schedule to Law 19, 1891 (Natal Native Code) which have not been complied with.

LAZARUS MOKGELEDI v. SOLOMON MORE.

1930. *May* 13. Before STUBBS, President, C. N. MANNING and L. GANE, Members of the Court.

Slander.—Damages.—Absence of corrobative evidence.—Onus *of proof on appellant.—Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Krugersdorp.

Where appellant in May, 1929, brought an action against respondent for slander notwithstanding his own evidence that he was in possession of the facts of the alleged slander in December, 1927, and called one witness to whom the slander was uttered; and where it was argued that the words complained of were uttered in the presence of school children at which school appellant was a teacher, and that the uncorroborative evidence of the witness must be accepted in view of the surrounding circumstances that the words complained of were used in the presence of the children at which school respondent was the principal.

HELD: That in view of appellant's delay for such a long period in bringing the action against respondent and in view of the absence of corroborative evidence the *onus* of proof which was on appellant to prove his case had not been discharged.

The appeal was dismissed with costs.

For Appellant: Mr. *van Soelen*; for Respondent: Mr. *Hafner*.

STUBBS, P.: The action for slander is brought by Lazarus Mokgeledi against Solomon More and the sum of £100 is claimed as damages. The language alleged to have been used by the respon-

dent of and concerning the appellant to one Simon Gabashane in September, 1927, is:—

> " He is a wicked person, a rebel, a disturber of the peace, an inventor of quarrels who is most undesirable, and who is hated by the people of the Church of England, and I am afraid he will rob me of my work."

The respondent (defendant in the trial court) denied having made us of any such words and put plaintiff (appellant) to proof thereof. Appellant called as witness Gabashane to whom the alleged slander was uttered. His evidence is that the words were spoken of and concerning appellant by respondent at his (Gabashane's) house in September, 1927, in the presence of his wife. His wife has not been called as a witness.

The appellant in his evidence refers to a confession and retraction alleged to have been made by respondent on the 24th October, 1927, in addressing the school children in the presence of himself (appellant) and the mistress of the school that he (respondent) had been told that " he (appellant) was a wicked person, a rebel, a disturber of the peace, an inventor of quarrels who was most undesirable and hated by the people of the Church of England and was afraid he would rob him of his work." Beyond a reference that he had heard in December, 1927, about the defamatory statement from Gabashane no further evidence has been adduced in support of his allegations as to the respondent's confession and retraction concerning him (appellant) in addressing the school children in the presence of the mistress. If this statement were true plenty of evidence was available and could have been called in corroboration which would have lent colour to the testimony of Gabashane.

Respondent's evidence is a denial that he made use of the words complained of. He states that it is a made-up story. In answer to Mr. *van Soelen* he states significantly " I told you that the words referred to in the summons were never used by Raborife and Mphalele " which it is reasonable to infer in the circumstances relates to the same explanation alleged to have been given by him at the school gathering referred to by appellant. He has been a teacher for twenty years. He disclaims any instrumentality in the dismissal of appellant from his post, and says that the relations between them have been amicable, and that when asked by one of the school authorities, Mr. Brookes, how the appellant was carrying on his work he (respondent) spoke commendably about it.

The significant features in this case are:—

(1) Gabashane in September, 1927, was told the words upon which the action is based and he informed appellant only four months later after he had had a difference with respondent about the building of a house in respect of which Gebashane had actually brought him to Court and as a result there was at that time bad blood between them—Gabashane and himself. His evidence is therefore undoubtedly tinged with prejudice.

(2) Appellant seems to have explored the possibility of finding suitable persons against whom to found actions for defamation, for he states he wanted to bring actions against a number of others, namely, D. Rule, T. Mothlabi, Mabasotho Molatlhadi and Raborife but eventually he seems to have abandoned the less favourable prospect and made the attempt upon the respondent.

(3) He has evidently not been a success in any of his numerous employments as teacher for he seems to have gone from pillar to post—from Pretoria to Pietersburg at which latter place he was dismissed; from the latter to Rustenburg and from Rustenburg to Krugersdorp at which latter he was again dismissed: the terms of dismissal are given in the letter addressed to him by the Director, Exhibit C.

Appellant was in possession of the facts relating to the alleged slander in December, 1927. He continued to occupy a responsible position as teacher at the school and in April, 1929, he became the acting principal. It was only after having received from Mr. Rhodes the intimation on the 30th March, 1929, terminating his services as from the 30th June of that year that he elected to bring the action against respondent.

If Gabashane's story is true, and if appellant believed it to be true, it is difficult to understand why he delayed a matter for over fifteen months before instituting action. He states that the respondent was his principal in 1927 and on the date of the inspection of the school on the 24th October, 1927, respondent in a retraction of the identical words communicated to him (appellant) by Gabashane said of him (appellant) that he was a good teacher which coupled with respondent's own statement that he had always spoken commendably of appellant's work must have influenced his elevation to the principalship of the school. Notwithstanding that he had been previously warned by Mr. Rhodes

(Exhibit A), that if he should have any further trouble from him (appellant) in "renewing the matter" whatever that may have meant, he would be replaced. The impression this leaves on my mind is the strong suggestion that the letter from Mr. Rhodes dated the 30th March, notifying him that his services would be terminated on the 30th June, 1929, decided him to bring the action against respondent, which leads me to the consideration of Mr. *van Soelen's* argument that Gabashane's evidence notwithstanding, although uncorroborated should be believed, and because of want of corroboration this was not a reason for its rejection by the Native Commissioner. Now it seems to me in face of respondent's definite denial of having made the statement imputed to him by Gabashane of and concerning appellant that the Native Commissioner was bound to take all these aspects into consideration in assessing the value of Gabashane's evidence and in the light of these to reject that evidence.

I see no reason to disturb his finding.

The appeal is dismissed with costs.

Gane, Member of Court: The only evidence in support of the allegation is that of Simon Gabashane who testifies that the words set forth in the summons were used by the respondent in the course of a conversation in September, 1927.

The appellant himself testifies that on 24th October, 1927, the respondent after school inspection said to the school children that he had been told that the appellant "was a wicked person and a rebellious teacher, a disturber of the peace and an inventor of quarrels, who is most undesirable, who is hated by the Church of England's people," that he believed the words when he was told them, but now he had found out that the appellant was a good teacher. He admits that feeling in the location against him was strong, and that ultimately he was dismissed by the Superintendent of the school. Apparently he wished the Court to imply that respondent was responsible for his dismissal, but there is no proof of this.

The respondent denies the alleged conversation with Gabashane, and denies that he has ever said anything defamatory about the appellant, whose work was satisfactory.

The documentary evidence put in does not assist the Court, and merely shows that the appellant was taken to task by his superiors for some reason not set forth and was ultimately dismissed.

The Native Commissioner in his reasons for judgment refers to the fact that there is no corroboration of Gabashane's statement. While perhaps the lack of corroboration may have influenced his decision he states: "The Court after hearing the plaintiff's case had grave doubts as to whether the words mentioned in the summons had ever been uttered by the defendant." And it appears to be clear that the lack of corroboration was not the only matter that influenced him. The Native Commissioner had the witnesses before him and there existed in his mind a grave doubt as to whether the appellant had discharged the *onus* on him to prove his case. It is impossible for this Appeal Court on the Record to hold that the appellant has proved his case, and the appeal should be dismissed with costs.

MANNING, Member of Court: I agree that in the face of respondent's direct denial, the testimony of the single witness Gabashane is not conclusive and it is difficult to see how, in the circumstances, respondent could bring other evidence to rebut the allegation set out in the summons.

It has been argued before us, for appellant, that the case except as regards damages, rests on Gabashane's testimony and that this Court is as well able to judge of his credibility as was the Native Commissioner, but reference to this witness' statements on several points in the Record, indicates that he was not entirely impartial, e.g., in examination-in-chief he says, without showing justification, that "In December, 1927, as a result of these libellous words I heard a fight going on amongst children . . . . . I suspected where the trouble came from . . . . . ."

I consider that the decision in the court below was correct.

1930. *May* 14. Before E. T. Stubbs, President, C. N. Manning and L. Gane, Members of the Court.

Retrospectivity of section 11 *of Act* 38 *of* 1927.—*Prohibited degrees of relationship, parties first cousins.*—Lobolo *claim in respect of invalid union.*—*Absence of wedding ceremony.*

Facts: An appeal from the Native Commissioner's Court at Piet Retief.

Where in the court below plaintiff, the heir to his father's estate, claimed sixteen head of cattle in respect of *lobolo* for his sister who was the first cousin of defendant and who lived with defendant since 1918 and where the Native Commissioner gave judgment for absolution from the instance on the grounds that Act 38 of 1927 in respect of *lobolo* claims was not retrospective and therefore plaintiff (appellant) could not succeed; that the parties to the union fell within the prohibited degrees of relationship, being first cousins, and that therefore there was in Native law no valid union and no *lobolo* could be claimed; and that as there was also no wedding ceremony in accordance with Native usage the appellant could not succeed in a claim for *lobolo*.

Held: That sec. 11 of Act 38 of 1927 is clearly declaratory in its nature, and simply indicates that Courts must deal with all *lobolo* cases that come before them for adjudication upon the footing that the institution of *lobolo* is one which it is not contrary to public policy to recognise as between Natives. And it was therefore intended to apply to all *lobolo* contracts which may come before the Courts for adjudication irrespective of the time when the marriage was entered into or the claim for payment or refund of *lobolo* arose.

The section does not purport to change the character of the institution of *lobolo*, but to indicate its true character and to nullify the effect of legal decisions which had wrongly invested the institution with the character of being *contra bonos mores*.

Held, further, that as the evidence established that the parties are first cousins, according to strict Zulu and Swazi customary law, respondent and appellant's sister definitely fall within the prohibited degrees of matrimony and therefore appellant could not succeed in his claim for the recovery of *lobolo* as the union of his sister to respondent was barred by law.

The appeal was dismissed with costs.

Reference made: Maxwell on *Statutes* (Sixth Ed. pp. 356-369).

For Appellant: Mr. *Oosthuizen* (instructed by Mr. Her. Olmesdahl); for Respondent: Mr. *de Wet* (instructed by Mr. Ferreira).

Stubbs, P.: The claim in the court below is for sixteen head of cattle in respect of *lobolo* for one Maponi the sister of plaintiff and the first cousin of defendant.

Appellant (plaintiff in the court below) is the heir to his father's estate and as such is suing the respondent (defendant in the court below) for the recovery of the sixteen head of cattle. Respondent's plea is one of general denial and he puts appellant to proof of his claim.

The facts as they appear on the Record are somewhat tangled and involved. It is therefore difficult to state them in such sequence as to make them sufficiently intelligible to form a proper estimate of their value and the issue to which they are directed, as this has been, materially clouded by the insinuation in his reasons for judgment by the Native Commissioner of a variety of grounds which are based on purely common law principles, while it would appear from a number of his arguments he has sought to deal with the matter in accordance with Native customary law. There is thus a confusion of the two systems. The Native Commissioner, influenced, no doubt, by the contentions of the attorney for the respondent, seems to have considered it necessary to view the case from various angles of common law and Native customary law. It is a little difficult to ascertain from his reasons the precise ground upon which he arrived at his judgment of absolution from the instance with costs without trying out the case on its merits. He has introduced discussion on the following grounds without the support of any specific plea beyond that of general denial:

(1) Act 38 of 1927 in respect of *lobolo* claims is not retrospective, therefore appellant cannot succeed.
(2) *Res judicata*.
(3) Novation.
(4) The parties to the union fall within the prohibited degrees of relationship—first cousins—therefore there was in Native law no valid union and plaintiff cannot claim *lobolo* in respect of an invalid union.
(5) That as appellant and respondent are in respect of such union *in pari dilicto*, appellant cannot claim *lobolo* as the subject-matter of the consideration—the union I suppose—is illegal.

(6) That as there was no wedding ceremony in accordance with Native usage the appellant cannot be heard to succeed in respect of the claim for *lobolo*.

The foregoing reflect the grounds on which the Native Commissioner seems to have approached the matter in arriving at a decision, but mainly it would seem his judgment is influenced by grounds (1), (4) and (6) and in considering whether or not he was justified in taking up that stand, the various lights in which the grounds have been presented by him necessitate discussion.

I shall now deal with them categorically:

(1) It is manifest that if the facts disclosed that the matter was one in which the Native Commissioner felt he was bound to follow the previously decided cases of the Supreme Court, quoted by him, and that he was right in holding that the provisions of sec. 11 of Act 38 of 1927 in regard to *lobolo* actions are not retrospective, he was entitled to take cognisance of these aspects which I now propose to discuss.

The presumption in both English and Roman Dutch law is against the retrospectivity of a statute, and the presumption is operative unless a contrary intention clearly appears from the statute either expressly or by necessary implication.

With reference to sec. 11 (*supra*), I think that an analysis of that section leads to a conviction that it was intended to apply to all *lobolo* contracts which may come before the Courts for adjudication irrespective of the time when the marriage was entered into or the claim for payment or refund of *lobolo* arose (excepting those cases which have already been adjudicated upon by a competent Court and are *res judicatae* (see *Halsbury*, vol. 27, sec. 308) and perhaps some cases where the claim has become prescribed).

The natural meaning of the words and the plain intention embodied seems to be a prohibition against Courts henceforth giving effect to the view that had formerly received considered judicial approval, namely that a *lobolo* contract was unlawful as being *contra bonos mores*. The section is clearly declaratory in its nature, and simply indicates that Courts must deal with all *lobolo* cases that come before it for adjudication upon the footing that the institution of *lobolo* is one which it is not contrary to public policy to recognise as between natives. Any other construction would be strained and any arguments *contra* must be based on the use of the word " is " in the expression " is repugnant to the principles of public policy," etc. The argument must

necessarily be that these words do not preclude a Court from declaring that a contract of *lobolo* was "repugnant to the principles," etc. at the time it was made, if such time was before the Act. So that a Court would be forced, if the argument is pressed to its logical conclusion, into the ridiculous position of solemnly decreeing with regard to a *lobolo* contract entered into the day before the Act became operative that it is contrary to the principles of civilisation, and with regard to one of the following day that the same contract was not contrary—i.e., that civilisation and public policy and its principles had overnight changed colour or weight. Once it is admitted that the section is declaratory the argument *contra* restrospectivity has only to be stated for its absurdity to be self evident. The section, being declaratory, does not purport to change the character of the institution of *lobolo*, but to indicate its true character, and to nullify the effect of legal decisions which had wrongly invested the institution with the character of illegality.

The Legislature must be presumed to have known that there were in existence at the time many thousands of *lobolo* contracts which were in the light of *Kaba* v. *Ntela* (1910, T.P.D. 964) illegal contracts in the Transvaal; and it would have been natural for the Legislature if such was its intention, to indicate in clear words that the Courts were to regard and deal with all such contracts as illegal, and only to regard such contracts as were entered into after the Act as legal. Such a state of affairs would be manifestly absurd and unjust, and to read such an intention into words naturally susceptible of a more reasonable and just intention would be contrary to all accepted canons of construction. For there is a strong presumption against an intention of either injustice or absurdity—Maxwell on *Statutes* (ed. 6, pp. 356-369).

Again, the presumption against retrospectivity is based on the equitable consideration that the Legislature is presumed to intend the confiscation, forfeiture or extinction of existing vested rights unless the contrary clearly appears. *Maxwell* (et. p. 38). Can it be said that to give sec. 11 retrospective operation would involve this result? The fact that a *lobolo* contract depended upon the operation of the maxim "*In pari delicto potior est conditio defendetis.*" Dealing with the nature of this maxim Lord Mansfield in *Holman* v. *Johnson* (Comp. 343) said of it: "It is not for the defendant's sake however, that the objection is ever allowed—but it is founded in general principles of policy, which the defendant

has the advantage of, contrary to the real justice as between him and the plaintiff—by accident if I may so say." Cp. also Brown's *Legal Maxims* (ed. 8, p. 562): "It is a maxim of law established not for the benefit of the plaintiff or defendant in a suit, but founded on principles of public policy."

Such being the case, the defendant in a *lobolo* suit prior to the Act cannot be said to have any vested right by reason of the operation of the maxim above referred to which would be disturbed by giving the section retrospective operation. If he had any right at all, it was a right of defeating an equitable claim—a right which is little worthy of respect. It is certain that no equities would be disturbed by giving the statute retrospective operation. Rather the result would be that the equities of the transaction would be made effective.

In any case, it is clear that when an enactment is in its nature declaratory, the argument that it must not be construed so as to take away previous rights is not applicable. *Maxwell* (ct. p. 394.)

To conclude, therefore, it seems that from whatever angle or aspect the section is viewed, it must be construed as having reference to existing *lobolo* contracts as well as prospective ones.

(2) *Res judicata* need not occupy much time. It is clear from the summons that the claim is not in respect of the substituted agreement whereby the *lobolo* for Kabonina was to replace that which respondent agreed to pay for Maponi but is founded on the latter. Therefore the subject-matter of the claim decided by the Chief Ngubu is not the same as the one before the trial Court. *Res judicata* cannot therefore apply. In any event the respondent is out of Court as *res judicata* was not raised by way of objection or in any other form, except in argument, in the court below.

(3) Neither was novation specially pleaded. Even if it had, again, respondent would be out of Court as there is no true novation in Native law as in Roman-Dutch law. If a native failed to implement an agreement whereby he novated in the Roman-Dutch law sense an original claim then he would fall back upon the original claim. Tht second agreement here does not affect the original obligation but merely substitutes a mode of payment for the convenience of the debtor and if he prevents this mode of payment from operating he should not be allowed to escape liability.

Respondent merely "pointed out" Kabonina from whose *lobolo* the debt should be paid. This is clearly legal, but what if

Kabonina had died before marriage? Could respondent say he was no longer liable. I clearly think not. He did not give Kabonina herself to appellant but simply indicated her as the source from which his debt would be paid.

The practice is to give effect to the original claim and treat the substituted agreement merely as an admission of liability and as a mode of payment.

If for example, appellant refused to accept the *lobolo* received for Kabonina then the Court would non-suit him because he had agreed to accept payment in this way. If he brought an action before Kabonina married he would be met by a defence that the action is premature and he must wait until the marriage takes place because he agreed to give him (the debtor) time in which to pay. It is really a *pactum de non petendo*, an agreement not to sue for a certain time.

One can understand this because in olden times there was no coined money and all debts were paid by cattle.

(4) The evidence seems to indicate that Maponi and respondent are the offspring of mixed Zulu-Swazi parentage. The evidence as to the degree of their relationship is somewhat conflicting. The Chief Ngubu makes them out to be uncle and niece. He states that Maponi and respondent are from separate mothers by one father. Maponi's mother on the other hand says quite definitely that respondent is her brother's child which would make him and Maponi first cousins.

I think where there is this conflict we are entitled to say that the mother because of her intimate association with her family is in a better position to give more reliable evidence on the point than the Chief of the tribe. For this reason I accept her evidence as correctly stating the position.

Among the various Basuto tribes, as distinguished from some of the other Bantu tribes, the modes of contracting customary unions are of a fairly homogeneous character. With them cross-cousin unions of the usual type, i.e., the mating of a young man with his brother's daughter is encouraged.

Unions of the other cross-cousin type, such as the union alleged in this case (i.e., with father's sister's daughter) are also allowed, but only the first type is permitted among the Khaha-Pedi according to Junod. The only cousin union which, from the authorities, is definitely taboo is that of the children of sisters.

Among the Zulu on the other hand, the weight of authority is that no cousin union of any kind is allowed among the commonalty at present under ordinary circumstances. The evidence of the Chief Ngubu supported by other evidence and the consensus of authority is that in strict Zulu and Swazi customary law respondent and Maponi definitely fall within the prohibited degrees of matrimony.

Where, as in this case, the male and female are of a known degree of relationship, by common descent their union would be incestuous and such union, if a customary union, would be void.

As there could not be and there is not under the law of the tribes to which respondent and Maponi belong a valid union between them, it follows that appellant cannot succeed in his claim for the recovery of *lobolo* against respondent, not because he and respondent are *in pari dilicto*, but because there can be no recovery of *lobolo* in respect of a union barred by law. The finding of the Native Commissioner on this ground is therefore in accordance with the law and custom of these people. That being so, it is unnecessary to consider (6).

Mr. *Oosthuizen* for appellant has urged us to take the view that the amendment to the summons varied the cause of action so as to include a claim for twelve head of cattle which formed the substituted agreement between the parties and which he asks us to accept as founding a cause of action for damages for the seduction of Maponi in respect of which respondent agreed with appellant to make compensation by payment of these twelve head. Without expressing an opinion whether or not in Native law this would offer the desired remedy, I am unable to take this view of the matter. The appellant must stand or fall by his summons and the amendment.

The action is founded on a contract for *lobolo* payment and the amendment, allowed on the application of Mr. *Olmesdahl* for plaintiff in the trial court, to include the words "and damages" cannot, in the absence of an allegation of the ground on which the claim for damages is based, be taken to include and cover an action separable from the one sued upon or arising out of any breach, act or thing connected therewith.

The appeal must fail with costs.

Gane, Member of Court: I concur.

Manning, Member of Court: There appears little doubt that *lobolo* is the real claim in this action and that damages (which are distinct therefrom in Native law) are not at issue.

Arising out of the evidence as to the blood relationship existing between Maponi and respondent, which is noteworthy, is disclosed by appellant's own side—the important question should be considered as to the competency of these two to enter, at any time, into a customary union or to have intercourse without committing incest within its wide definition under the tribal laws of parties.

The evidence of the Chief Ngubu on the point, like that of other witnesses is complicated, and rather contradictory, though they all testify to a somewhat close blood relationship.

Nonsixosa Msibi (having the same surname as respondent), the widow of Kane and mother of Maponi states " Verweerder is my broer se kind," and thus respondent and Maponi would be first cousins and this witness' evidence should be accepted in preference to that of the others.

Appellant has stated he is a Zulu and therefore his sister would be the same. Ngubu says he himself is a Swazi with Zulu people under him though respondent is of his tribe. This Chief declares that the customs and laws of the Swazis and Zulus are the same: that according to these tribes respondent and Maponi are not allowed to marry, the blood being too close: that under old custom they would have been surreptitiously killed; that they were never married and live like dogs without any law but their own. I am of opinion that the Chief's views are correct and might have been stronger as it is common knowledge that under Zulu law which is broadly the same as that of the Swazi people, unions or intercourse between persons of the same blood are held to be incestuous and are looked upon with abhorrence. When the rule of the Kings or Chiefs was absolute, persons guilty of such offences were often killed outright as " dogs " together with any resultant progeny, or at least banished besides being repudiated by the other members of their families. The prohibition applied not only to those closely related by blood but as a rule to all persons of the same descent in the remotest degree. At the present time the ban is strongly observed though the drastic penalties have perforce been moderated or abolished.

Unions of persons of even the same surname (isibongo) although no direct blood relationship be traceable, are taboo. My view is

that should a man and woman related in any way by blood, live together it would be contrary to Zulu custom for the woman's guardian to claim *lobolo* for her or any children connected with the cohabitation. The Native Courts would not countenance such a claim and the guardian could not rightly accept *lobolo* seeing that this dowry constitutes a principal rite in an honourable union sanctioned by the people.

The evidence on the Record does not support nor purport to be for damages and whilst it is debatable whether they could, in view of the relationship of the parties, legally be claimed, this point need not in the circumstances be decided now. However, regarding the question of *lobolo,* as already indicated, it would, I consider, be against all usage for a Zulu or Swazi to ask for or take payment in this respect and thus " besmirch his house by eating of abomination " (U zobe ngcolisa indhlu yake ngokudhla amanyala).

According to these tribal laws, respondent has committed a serious social and moral offence and in spite of Chief Ngubu's statement, " as mense so bly soos honde kan beeste geëis word " and his advice first to Kane and then to appellant in the matter, I am of opinion that however hard and unfortunate it may be for appellant, under Native law which is the only one applying to such cases, he has no legal remedy in regard to his claim for *lobolo* though he appears to have been otherwise compensated to a certain extent by the receipt of some cattle in the earlier stages of this dispute.

Even if it were to be held that an agreement had been arrived at between appellant and respondent as to payment of *lobolo* in respect of the cohabitation between respondent and Maponi, the accepted fact that the latter are at least first cousins and are committing incest according to their tribal laws, would render the consideration for the contract immoral and the agreement thus be barred by the Courts.

Apart from the several reasons given by the learned President and in which I concur, I consider that the foregoing facts are sufficient for the dismissal of the appeal.

1930. *May* 20. Before STUBBS, President of the Native Divorce Court.

Divorce on grounds of adultery.—Plea of condonation.—Maintenance of children.—Costs.

FACTS: Where plaintiff sued defendant for a decree of divorce on the grounds of adultery, and claimed maintenance for the children at the rate of £5 per month, forfeiture of the benefits of the marriage and costs of suit; and where defendant pleaded condonation in that adultery was committed with knowledge and consent of plaintiff, who notwithstanding the adultery still cohabited and lived with defendant.

HELD: That as defendant admitted cohabitation with another woman and continued to cohabit with the said woman, plaintiff must succeed in her claim on the grounds of adultery.

A decree for divorce was granted; but as defendant only earned £4 per month it was ordered that he should pay £2 per month towards maintenance of the children and costs of suit.

For Plaintiff: In person; for Defendant: Mr. *G. Botha.*

JACOB MONAHENG v. REBECCA KONUPI.

1930. *May* 21. Before STUBBS, President, C. N. MANNING and L. GANE, Members of the Court.

Detribalised natives.—Application of civil law or Native customary law.—Seduction.—Excessive damages.—Rule 27, *Government Notice No.* 2253 *of* 1928.—*Absence of evidence.*

FACTS: An appeal from the decision of the Native Commissioner at Johannesburg.

Where in the Native Commissioner's Court appellant was sued by respondent, both detribalised Natives living in Johannesburg, for seduction and damages, and where, in the course of the evidence respondent in particularising her claim stated that appellant had spoiled her and asked that he maintain the child, and where the Native Commissioner accepted this under sec. 27 of the regulations as an amendment of her claim to include maintenance and on the

unsupported evidence of respondent accepted the claim for seduction as established and awarded respondent £25 for seduction and maintenance, and where appellant maintained that the damages awarded were excessive in that according to the evidence recorded judgment should have been awarded for two head of cattle only or in the alternative for the payment of their value £10, and where the Native Commissioner purported to deal with the case under common law.

Held: That as the Native Commissioner had purported to deal with the case under common law in the absence of independent evidence to establish the claim for seduction he should have had considerable doubt in the matter and should have given appellant the benefit of the doubt. Only on the seduction having been proved could the woman's evidence as to the paternity of the child have been accepted as conclusive. The appeal was sustained with costs and the judgment of the Native Commissioner was altered to one of absolution from the instance with costs.

The Court remarked that as the parties were detribalised and had adopted standards of living and outlook of the more enlightened classes it had to share the view of the Native Commissioner that the parties were to be regarded in a light wholly different to the primitive order of society of the kraal, yet it took this view most reluctantly as it seemed desirable in cases of this nature to avoid, as far as possible, getting away from a system of law which is more in harmony with Native concepts of equity and justice, whatever its shortcomings may be from our standpoint.

For Appellant: Mr. *Pickard*; for Respondent: In person.

Stubbs, P.: The parties are apparently detribalised and their place of residence is the Native Township, Evaton and Johannesburg, respectively.

The appellant was sued in the Court of Native Commissioner, Johannesburg by respondent, Rebecca Konupi for seduction and damages and the sum of £25 claimed. In the course of the evidence of respondent in particularising her claim she stated that defendant (appellant) had spoilt her and asked that he maintain the child. The Native Commissioner accepted this as an amendment of her claim to include maintenance under sec. 27 of the Regulations for Courts of Native Commissioners in civil cases. The plea is one of denial of the seduction or parentage of the

child. The Native Commissioner accepted the evidence of plaintiff and awarded her judgment for £25 for seduction and maintenance of the child.

Appeal is brought against this decision on the ground that:—

(1) It is against the weight of evidence.
(2) It is bad in law.
(3) That inadmissible evidence was admitted on the Record.
(4) That the damages awarded are excessive in that according to the evidence recorded judgment should have been awarded for two head of cattle only or in the alternative for the payment of their value, £10.

The Native Commissioner in giving reasons for judgment states, *inter alia*:—

"The Court considered that from the manner in which plaintiff gave her evidence and from her demeanour in the witness box her evidence was to be believed.

"Defendant gave the impression that he was not straightforward in his evidence and that he could not be believed. Apart from this aspect it is necessary to draw attention to the defendant's reply to the Court (page 6) where he stated that he knew in May that plaintiff was pregnant but yet continued to love her until June. In answer to plaintiff (page 6) defendant admitted that in June when plaintiff wished to return to Evaton he gave her money to enable her to do so.

"It does not seem reasonable that defendant should have still been in love with plaintiff in June when he knew in May the month previous that she was pregnant by some other man and that knowing this he also should give her her fare to Evaton.

"It is considered that defendant in his evidence has thus given the evidence *aliunde* which is requisite to enable the Court to give plaintiff judgment in an action for seduction.

"Defendant in his grounds of appeal draws attention to certain hearsay evidence having been admitted.

"It is not denied that the evidence referred to is inadmissible. It will be appreciated, however, that in taking evidence from a witness whose evidence is being given without the aid of an attorney a Court is prove to record inadmissible evidence before this is sometimes apparent. In this instance the Court observed that the evidence tendered was inadmissible

immediately after it had been recorded. The Court wishes to make it clear that no weight at all was placed on Miriam Konupi's statement that Piet Pahlane had told her that defendant admitted to him that he had caused plaintiff's pregnancy. Piet Pahlane in his evidence earlier stated that no such admission had been made to him.

" One of the grounds of appeal is that judgment in any case should have only been given for two head of cattle or their value £10 in accordance with what plaintiff herself admitted was the custom.

" It is clear from the provision of sec. 11 (1) of Act 38 of 1927 that the Court has a discretion in the matter of whether the ordinary civil law or Native customary law should be applied.

" It is correct to assume, I think, that it was the intention that this discretion should be reasonably exercised.

" The parties in this case can be taken to have become detribalised. Plaintiff is living at Evaton a native township not far from Johannesburg, and defendant is a native constable stationed in Johannesburg.

" There can be little doubt that a mother living in a kraal in the country under tribal conditions is put to little expense in the maintenance of her child, whereas the greater expense attaching to the rearing of a child in an industrial area in the way of housing, food, clothes and education is a factor which I think has to be considered.

" I do not consider an award of £10 to cover maintenance as well as damages to the woman for seduction is adequate under the present circumstances.

" I think therefore that it is reasonable to apply European civil law under which the Court is competent to make an award which is considered reasonable in the circumstances and not too great an amount to give the plaintiff.

" The judgment should perhaps properly have stated in what amounts the £25 was apportionable in respect of seduction and maintenance respectively. It is usual to allow £10 for seduction and £15 for maintenance."

It seems fairly obvious from his reasons for judgment that the Native Commissioner considered that the parties to the suit had abandoned Native customs and modes of life and were living as

Europeans; he therefore elected to decide this matter under the common law and eschewed Native law. We must therefore deal with it as a matter falling under the former system.

That being so, although the point has apparently been overlooked in the court below and has not been made a ground of appeal, we must first consider whether plaintiff in that Court was competent to sue as a *feme sole?*

In South Africa and under Roman-Dutch law a girl who, having been a virgin, is seduced is herself entitled to sue for damages as for an injury to herself personally, without the intervention of her parents unless, of course, she is a minor, when she must be assisted, so far as the mere institution of the action is concerned in the same way as other plaintiffs who are minors, though the injury is one to herself personally.

In the case before us it is not stated on the Record whether or not the plaintiff has attained her majority, but it is assumed she is a major. It need not be alleged that the party is a *feme sole*: the law does not presume incapacity.

If this action had been maintained at Native law the respondent would be out of Court because it is the almost invariable unwritten rule among the Bantu that the action is brought by the girl's parents or guardian, but in the circumstances of these people living in a large industrial centre as they do and having become detribalised and adopted standards of living and outlook of the more enlightened classes it seems to me, as with the Native Commissioner, that we are bound to regard them in a light wholly different to the primitive order of society of the kraal. I, however, take this view most reluctantly because the moment we break away from established institutions of Native customary law in these matters, we find ourselves confronted with innumerable fine distinctions and complications. For example, the rules of evidence as to proof of seduction or paternity are more simple in Native law than in our law; again, the seduction of an unmarried woman who has already had a child is actionable among certain tribes, while, with us in modern practice an action for seduction is only in favour of a virgin who has lost her virginity by reason of the seduction. Many other distinctions calculated to confuse and perplex a people less enlightened than ourselves could be enumerated, but I think by indicating the above two I have sufficiently shown how desirable it is in cases of this nature to avoid, as far as possible, getting away from a system of law, whatever its shortcomings may be

from our standpoint, that is more in harmony with Native standards and their conceptions of equity and justice.

In considering the appeal on the merits the first point to be taken is that of the weight of evidence. The rule is that the Court requires further proof of the seduction than the unsupported evidence of the seduced woman herself. On the seduction being proved the woman's evidence as to the paternity of the child is conclusive.

Rebecca Konupi's (respondent) evidence is that she slept with appellant one day in December, 1928, on the veld. Before this she was a virgin. In January she became pregnant and on the 30th September, 1929, she gave birth to a male child. She told appellant of her condition and he told her to go home. His people were summoned to discuss the matter but did not come. She further states that a man who seduces a girl and a child is born has to pay two head of cattle for seduction and maintenance.

Her mother deposes to appellant's frequent visits to her but not since her daughter's pregnancy.

Defendant tells his story simply and straightforwardly. He denies the seduction and paternity of the child and explains his affection for the girl and the reasons why he loaned her the money for her fare.

The Native Commissioner had drawn the inference from appellant's admission that he knew in May that respondent was pregnant yet he still continued to love her until June, 1929, and that despite this knowledge he should give her her fare to Evaton—a matter, I suppose, of a few shillings—that this furnishes the evidence *aliunde* requisite to entitle the Court to give judgment in her favour in the action for seduction. But on the naked evidence of the respondent unsupported in any way either by independent evidence or circumstances in which she testifies merely to a simple act of coition in the open veld, and in the absence of evidence from the mother, her sole guardian, that she was ever told by her daughter (respondent) of her condition, and in the face of appellant's denial, for the Court to say that the seduction has been definitely established would be to expect it to travel beyond the bounds of reason and prudence.

Appellant's statement of the position is a frank and open one and consistent with his innocence in the matter. It is not as singular as the Native Commissioner would think that his affection for the girl should not immediately cease after he had become aware

of her pregnancy by another man and it is understandable that his feelings for her at the time may have influenced him in helping her out of a predicament in advancing to her the matter of a few shillings for her fare from Johannesburg to her home at Evaton. After all the Native Commissioner in electing to try the issue at common law regarded them as being several degrees above the kraal Native and in affairs of the heart and quixotisms is it safe to dogmatise and say that a Pagan, assuming the appellant is a Pagan, whether black or white, is so far removed from the Christian and are we to say, as the Native Commissioner has said, that we must read into these things provision of evidence *aliunde* establishing her claim? I think not. The Native Commissioner should have had considerable doubt in the matter and should have given defendant in the court below the benefit of the doubt.

The appeal is sustained with costs and the judgment of the Native Commissioner is altered to one of absolution from the instance with costs.

MANNING, Member of Court: I concur.

GANE, Member of Court: I concur.

RATLARANE RAMOGADE v. NETE SEBOLE.

1930. *May* 22. Before STUBBS, President, C. N. MANNING and L. GANE, Members of the Court.

Allotment of land by Chief to members of tribe.—Encroachment.—Law and custom of Batlako Tribe.—Costs.

FACTS: An appeal from the decision of the Native Commissioner at Rustenburg.

Where a Chief through a member of the lekgotla allotted land to appellant according to the custom that at the time prevailed, and where subsequently under a new lekgotla as a result of an innovated policy of land allotment which came into being after the old lekgotla had been replaced, in that no member of the Batlako Tribe should be allotted more than eight acres of arable land, the respondent was allotted land which allotment encroached on land already allotted to appellant and where the Native Com-

missioner on the evidence adduced dismissed the claim of appellant with costs.

Held: That as it was not clear whether there had been an agreed modification of the allotment previously made and that if, notwithstanding, eight acres had since been allotted to appellant under the new plan, there was nothing to indicate where this new allotment in relation to the disputed land was situated and the appeal must be sustained with costs.

The Native Commissioner's judgment was set aside and he was directed to call evidence on the points as to the time of appointment of the new lekgotla, the rule decreeing an allotment of eight acres, whether it was retrospective or not, the extent of land allotted to appellant and its situation in relation to respondent's land, when and under what circumstances the alleged encroachment took place. Costs hitherto incurred in the court below were ordered to be costs in the cause in that Court.

For Appellant: Mr. *H. Cranko*; for Respondent: Mr. *T. P. C. Boezaart*.

Stubbs, P.: An appeal from the decision of the Chief Mabi of of the Batlako Tribe, Mabieskraal, Rustenburg District, was brought in the Court of Native Commissioner, Rustenburg, by Ratlarane Ramokgade against Nete Sebole, appellant and respondent respectively in this appeal, in connection with an alleged encroachment in November of last year by appellant upon certain arable land which respondent claims had previously been allotted to him on the authority of the Chief Mabi on the tribally owned farm Vlakfontein, situate in the Rustenburg district. Appellant in answer denies the encroachment and says that the land in respect of which dispute has arisen was never allotted to respondent but to him by the Chief in or about 1920 and in 1925 when he proceeded to plough the said land he found that respondent had encroached upon it and had ploughed three acres of it.

The Native Commissioner after having heard the evidence on both sides including that of the Chief and several members of the lekgotla upheld the Chief's decision. Appeal is now brought from the latter decision on a number of grounds, chief of which are that:

(1) The judgment is against the weight of evidence.

(2) The judgment is against the law and custom of the Batlako Tribe.

An inspection *in loco* of the disputed area was held by the Native Commissioner on the application of Mr. *Cranko* for appellant and he has appended a report of the facts he found established as a result of the inspection. Mr. *Cranko* however, on the 8th April gave notice to the clerk of the court of the facts which, he says, at the time of the inspection were pointed out on the appellant's behalf but were not dealt with in the Native Commissioner's judgment, page 24. The appellant in his evidence states that the Chief sent Matlana to allot him the land in question which he ploughed uninterruptedly for ten years up to the time of the alleged trespass by respondent. The matter of respondent's complaint formed the subject of investigation by the lekgotla members but he was not present when they investigated. The Chief, he states, gave no decision but he admits the Chief told him that that portion of the land—presumably the land in dispute—belonged to Nete (respondent). His only witness is his son Joseph whose testimony is that he was present when Matlana allotted the land to his father. It was measured and pegs put in surrounded by stones. He has since seen the same land which has been ploughed up. Matlana, he states, is dead.

Nete Sebole, the respondent, in his claim to the disputed land is supported by Moghari Sehune a member of the Chief's lekgotla, Motoni Ramaghade, Headman, and Samuel Koetseme, Secretary to the Chief Mabi, each and all of whom disclaim any knowledge of the allotment alleged to have been made in favour of appellant by Matlana during his lifetime. It is admitted, however, that he was clothed with authority to allot land at the instance of the Chief, but the Chief emphasises in his evidence that more than one member possessing such powers should be present when an allotment is made. These witnesses aver that the initial complaint of encroachment emanated from respondent who alleged that appellant had ploughed up land belonging to him (respondent) and after a careful investigation by the members of the lekgotla it was found as a fact that he had done so and on being told of the finding he signified his acquiescence. As the result of an innovated policy of land allotment which came into being after the old lekgotla had been replaced by the new, the members of the Batlako Tribe under Chief Mabi, it would seem from the evidence, are no longer allotted more than an average of eight acres of arable land each. It is alleged by some witnesses that at the instance of the Chief eight acres were allotted to respondent

and pegs defining the area were put in and when the complaint arose of appellant's encroachment the matter was investigated and settled in the presence of the parties by four of the Chief's Counsellors who reported accordingly to the Chief. A second encroachment took place and the matter was again before the same authority which came to the same decision as before and duly confirmed by the Chief. The inspection *in loco* discloses that while respondent was found to have the maximum of eight acres only appellant claimed and had ploughed land in extent many times in excess of this acreage and had in fact encroached on land belonging to respondent. Mr. *Cranko's* point, if I understand him correctly, is that the land in dispute was by competent authority previously allotted to appellant and that in accordance with Native cutomary law he cannot legally be dispossessed of that land in favour of respondent or any other member of the tribe.

In examining the facts I am not able to reconcile Mabi's evidence with the evidence of the other witnesses for respondent on the very important point of the alleged allotment of the disputed land to respondent. Mabi says that when the land was allotted to respondent there were present Philemon Manupi, Moghari Sehubi, Motsomi Ramaghadi and Samuel Koetsebi and they were the same men sent down to the lands to investigate the subject-matter of this dispute. The three last named have been called but curiously enough, not one of them testified to having been present when the land was allotted to respondent. They each and all testify to the dispute that arose between the parties and say what part they took in it and how it was settled but throughout their testimony there is not a scintilla of corroborative evidence to support Mabi's statement that they or any of them as his representatives in fact allotted the land now in dispute to respondent. On the contrary, Moghari Sehube relied on one Gert a former lekgotla member, who was also sent to inspect the lands, to point out the beacons between appellant and respondent and he frankly confesses in cross-examination that he knows nothing about the land allotted.

Motsomi Ramoghadi has nothing material to add except that he denies Gert was present on the occasion to which Moghari speaks. Gert who no doubt could throw some light on the matter has not been called nor has Philemon Manupi been called. Mabi has never seen the land in dispute. He admits having authorised Matlana to allot land to appellant. He admits the custom is that land once allotted to a member of a tribe cannot be taken away. He

admits that when it was allotted to appellant there was only one member present—Matlana—and that appellant is the only man at present living who knows the boundary of the land allotted to him. He admits that if land were allotted to respondent which had been previously allotted to appellant by Matlana the allotment to the former would be bad. Contrast the evidence of this witness with that of respondent as to the men who were sent to allot to the latter the land he claims as his property. We find with the one exception—Philemon Manupi—they are all different. Respondent says they were Sekuru Ramatsu, Sher Ramokupela, Sefagu Mabi and the exception mentioned—Philemon Manupi; nor does respondent mention the three men who the Chief alleges were the men sent with Philemon Manupi to point out and allot the land to respondent. Here, again, none of these men has been called to support respondent's claim to the land in dispute.

The witnesses are all more or less agreed with the Chief that land once properly allotted to a tribesman cannot without just cause be taken away and granted to another tribesman. Respondent complained that appellant had encroached upon land allotted to him, the *onus* was therefore upon him to prove the encroachment and in order to do that it was open to him to call evidence which, if his statement is true, was available to him namely, the men authorised by the Chief to make the allotment to him as given in evidence by the Chief and/or the men as given in evidence by himself but beyond stating himself where that ground is situate, not a single witness has been called with the exception of Moghari Sehube, whose evidence has been reviewed, to corroborate him.

The diagrams put in in evidence and filed of record are not of much assistance. It is not clear from either nor is it explained in evidence nor by the Native Commissioner's note of the inspection *in loco* where exactly the alleged eight morgen belonging to appellant are situate. For example, in the Native Commissioner's diagram it is shown that appellant ploughed the land comprising the whole area within the four points G.E.F.D. in which is included the disputed area 2 and areas 3 and 4 which latter belong to absentee owners but we have no indication as to who owns Lot 1.

It is, as he says and as I have mentioned in the course of this judgment, the new policy to allot no more than eight acres per tribesman but on the evidence the innovation must have occurred after the allotment had been made to appellant by Matlana and there is nothing to show that that allotment did not in fact include

the land claimed by respondent or that the area allotted to appellant was, in pursuance of the new land policy referred to, subsequently modified by excision of that portion claimed by respondent. If there has been no agreed modification of that area as indicated and if, notwithstanding, eight acres have since been allotted to appellant under the new plan, there is nothing to indicate where they in relation to the disputed land are situate.

Until all these points have been elucidated by the best available evidence I cannot see that the Native Commissioner was justified on the facts before him in coming to the conclusions he has come to in the matter.

The appeal is therefore sustained with costs and his judgment set aside and it is directed that the issue be retried on the evidence as it stands and on fresh evidence to be called on the following points:—

(1) When the new lekgotla was appointed to replace the old?
(2) When the new land rule decreeing that members of the tribe be limited to an arable acreage not exceeding eight acres each came into operation?
(3) Whether it had retrospective effect and if so, to what extent prior rights were affected thereby including those of appellant?
(4) The extent of land allotted to appellant by Matlana; its exact situation and when allotted?
(5) Its situation in relation to respondent's land; the extent of land allotted to respondent and when allotted and its position in relation to the beacons existing indicating the extent of appellant's land at that time.
(6) If any encroachment has taken place by either party upon one or the other's land, where, when and in what circumstances such encroachment occurred.

Costs hitherto incurred in the court below to be costs in the cause in that Court.

Gane, Member of Court: In the plan attached to his "Reasons for Judgment" the Native Commissioner shows an area marked G.E.F.D. as having been ploughed by appellant. This area is divided up into five distinct allotments and is interesting only as showing the position of the land in dispute, but beyond this it does not disclose to whom the allotments have been granted, nor when the allotments were made.

The position is most unsatisfactory and this Appeal Court is not in a position to decide to whom the land belongs in the absence of further evidence. I agree that the appeal should be allowed, the judgment set aside and the proceedings remitted to the Native Commissioner for the taking of such further evidence on the points indicated in the learned President's judgment as the parties may wish to adduce, and thereafter to decide the case afresh.

Manning, Member of Court: I concur.

LANGMAN v. PETRUS MOHANE.

1930. *May* 23. Before Stubbs, President, C. L. Harries, and L. Gane, Members of the Court.

Native customary union.—Subsequent marriage by civil rites.—Desertion.—Return of lobolo.—*Costs.*

Facts: An appeal from the decision of the Native Commissioner at Springs, Benoni District.

Respondent in 1923 contracted a customary union with the daughter of appellant and paid *lobolo*; subsequently the parties were married by civil rites. In 1925 the husband was deserted by his wife who committed adultery. In the Native Commissioner's Court judgment was awarded respondent for the return of the *lobolo* against which judgment the appeal was brought.

Held: That the action brought by respondent for the recovery of *lobolo* was premature in that the marriage by civil rites had not been dissolved by a Court of competent jurisdiction.

Held, further: That although the return of *lobolo* either voluntarily or by order of Court dissolved a union contracted according to Native custom, it can have no such effect upon a civil marriage and therefore *lobolo* paid in respect of a marriage or union whether contracted by civil rites or Native customary law must be dealt with under Native law.

The appeal was allowed with costs and the judgment of the trial Court was altered accordingly.

For Appellant: Mr. *Robinson*; for Respondent: Mr. *Pudney*.

STUBBS, P.: The facts in this case are that the respondent in October, 1923, contracted a customary union with one Bella the daughter of the appellant and paid *lobolo* of four head of cattle and £30. Subsequently respondent and Bella were married by civil rites. During July, 1925, Bella deserted her husband and committed adultery with one Lucas Mbonani and on an action instituted against him by respondent, judgment of £30 damages and costs was awarded the latter.

The desertion continues. Respondent in his evidence states that he intends bringing an action to have the marriage dissolved.

The claim in the Native Commissioner's Court is one against Bella's father for the return of the *lobolo*. Judgment was awarded respondent for the return of the *lobolo* and appeal is now brought against the judgment on the ground that it is against the weight of evidence, the judgment is bad in law because the legal marriage still subsists and it supersedes the customary union, and the handing of the cattle to the father can only be considered a gift and not a contract on which an action can be based; that the effect of such judgment would be that the marriage, in the eyes of the Native population, would be deemed to be dissolved, whereas, in fact and in law, the marriage is still subsisting and of full force; and that the action and judgment are based upon an immoral consideration in view of the subsequent legal marriage.

The grounds with which we are concerned are those set out in 3, 4 and 5 of the notice of appeal.

It is clear that the acts of adultery and desertion occurred subsequent to the marriage by civil rites and the question at once presents itself whether during the subsistence of the marriage respondent is entitled to succeed in the recovery of *lobolo*?

The Native Commissioner seeks to sustain his judgment on the grounds:—

"That to hold a civil marriage entirely supersedes a customary union would in effect set aside the obligations arising from the contract of *lobolo*, which is one between the father and the intending husband of his daughter by which the father promises his consent to her marriage (union) and to protect her in case of necessity either during or after such marriage and by which in return he obtains from the husband valuable consideration, partly for such consent and partly as a guarantee by the husband of his good conduct towards his daughter as wife.

"In this case adultery on the part of defendant's daughter is admitted, and plaintiff's allegation that Bella refused to return to him was not denied by defendant. The Court therefore found that these actions by Bella constituted misconduct of such a nature as to justify the return to plaintiff of the *lobolo* paid, less certain deductions which the Court, in the absence of any evidence on the point by defendant, computed as follows: (*a*) In respect of the birth of a child of which plaintiff was the father and additional maintenance beyond the £6 contributed by plaintiff during his absence, which time Bella resided with defendant,—£15; (*b*) Expenses connected with the birth of such child, in what may be regarded as an industrial area,—£5; (*c*) Maintenance for the child for six months, £2; (*d*) Burial expenses,—£2, in all £24, leaving a balance on the claim of £26, for which amount judgment was entered with costs."

Mr. *Pudney* for respondent has argued that the cattle constitute a form of earnest and the obligations flowing from the prior union govern the position not the subsequent civil marriage and that the subsistence of the latter does not affect the former which in the eyes of the Natives still subsists and as there has been desertion of the wife respondent is entitled to succeed in respect of the *lobolo* paid. I am afraid I am unable to appreciate this line of argument, nor do I find myself in agreement with the views of the Acting Native Commissioner; on the contrary, I am of opinion that the respondent (plaintiff in the court below) must fail for the following reasons:

(1) The action brought by him for recovery of the *lobolo* is premature in that the marriage by civil rites has not been dissolved by a Court of competent jurisdiction.

(2) The return of *lobolo* either voluntarily or by order of Court dissolves a union contracted according to Native customary law but can have no such effect upon a civil marriage.

(3) If the order for the return of the *lobolo* were given effect to while the marriage subsists, the logical outcome would be that respondent would be placed in possession of both the *lobolo* and his wife, a condition which is opposed to Native customary law and one which would easily lead to collusion and fraud. *Lobolo* paid in respect of a marriage or union whether contracted by civil rites or Native customary law respectively, must be dealt with under Native law.

I do not think on the facts in this case it can be said that the prior customary union falls within the ambit of these proceedings. It has, as Mr. *Robinson* has argued, been superseded by the subsequent civil marriage and the legal position surrounding the *lobolo* question must, as stated, be governed by considerations of Native law. It is clear then that under this system the return of *lobolo* would terminate a customary union but we are here dealing not with a customary union but a civil marriage and obviously, while the marriage subsists the same principle in regard to *lobolo* holds.

The alleged desertion is beside the point. The respondent has his remedy for this—an action for divorce. The Acting Native Commissioner should have dismissed the claim with costs.

The appeal is allowed with costs and the judgment of the trial Court is altered accordingly.

Harries, Member of Court: I concur.

Gane, Member of Court: I concur.

ISAAC MORAKI v. MARTIN MADUNA.

1930. *May* 23. Before Stubbs, President, L. Gane and C. L. Harries, Members of the Court.

Prescription of claim under section 30 *of Act* 14 *of* 1912.—*Commencement of action.—Costs.*

Facts: An appeal from the decision of the Native Commissioner at Benoni.

The appellant (plaintiff in the court below) sued respondent (defendant) for £15 damages for false and wrongful arrest. Respondent is a member of the police force as defined by Act 14 of 1912 and acted in the execution of such Act. The cause of action arose on the 12th October, 1929. Summons was taken out on the 18th February, 1930, and was served on the 13th of February, viz.: more than four months from date of cause of action. The respondent (defendant) objected that the claim was prescribed by sec. 30, Act 14 of 1912. The summons having been served four months and one day after cause of action arose. The Native Commissioner upheld the objection.

Held: That the term "commenced" in the Act not only includes the "issue" of the summons but also the bringing of the summons to the notice of the defendant. The general rule is that an action begins with the issue of a summons, this being known as a judicial interpellation having the effect of arresting the course of prescription, but the summons must be served: an unserved summons is not a judicial interpellation so as to interrupt prescription.

The Native Commissioner's finding was upheld and the appeal was dismissed with costs.

Case Referred to: *Union Government* v. *Willemse* (1922, O.P.D., p. 14).

For Appellant: Mr. *Robinson*; for Respondent: Mr. *Lloyd*.

Gane, Member of Court: The appellant (plaintiff in the court below) sued respondent (defendant) for £15 damages for false and wrongful arrest on 12th October, 1929. Summons was issued on the 8th February, 1930, but was only served on the 13th *idem*. It is admitted in argument that a letter of demand was sent on 30th October, 1929.

The respondent objected that the claim is prescribed by sec. 30, Act 14 of 1912,—the summons having been served four months and one day after the cause of action arose. The objection was upheld by the Native Commissioner and the summons dismissed with costs. The appellant appeals on the grounds that as long as the summons is issued within the period of four months provided for in the Police Act, the action has been properly brought.

Sec. 30, Act 14 of 1912 reads as follows:—

> "..... every civil action against any person in respect of anything done in pursuance of this Act or the regulations shall be commenced within four months after the cause of action has arisen ....."

The question to be decided is the meaning of the word "commenced" in this section, and it is maintained that the action "commenced" on the date on which a summons was issued notwithstanding the fact that the summons was not served on that day.

Arguments have been adduced in support of this, and Mr. *Robinson* urges that as the terms of the Act limit the privileges of the subject in regard to the prescription of an action the terms

must be liberally construed and in such a manner as not to deprive him of his right of action. The privileges of the constable must, however, be taken into consideration, and the Act has provided that unless action has been taken within a specified time he shall be immune.

Sec. 30 of the Act provides that one month's notice of intention to take action shall be given, and that the action shall be commenced within four months. It is clear from this that the Legislature intended that the party against whom action is to be taken shall receive two notifications of the action and that the second shall be not later than four months after the cause of action arose.

Reference has been made to the case of *Union Government* v. *Willemse* (O.P.D., 1922, p. 14). In that case the summons was issued on 28th May, 1922, in respect of a debt that ordinarily would have become prescribed on the 30th *idem*. Owing to questions raised by the Sheriff as to the identity of the defendant, the process was only served on the 29th July, 1922; the defendant raised the plea that the debt was prescribed and the plaintiff maintained that prescription had been interrupted by the issue of the summons. Sec. 5, chap. XXIII of the O.F.S. Law Book provides "The period of prescription of any claim shall be interrupted by . . . . . judicial demand or summons . . . . . " and in giving judgment Ward, J. said "A demand cannot be considered to be made until it is communicated to a person who is required to comply with it—nor can any summons have any effect as a summons until it is served on the party who is called upon to obey it." This decision is clear and to the point, and it must decide the present case. I am, therefore, of opinion that the term "commenced" not only includes the "issue" of the summons but also the bringing of the summons to the notice of the defendant. It may be unfortunate that the appellant, who possibly is not at fault, should be deprived of his right of action, merely because the messenger has served the summons a day later than the four months laid down in sec. 30 of the Act, but his is no concern of the Appeal Court. The terms of the section are peremptory and cannot be departed from. If an indulgence of one day is allowed, later on an indulgence of 101 days may have to be allowed.

In my opinion the decision of the Native Commissioner should be upheld and the Appeal dismissed with costs.

STUBBS, P.: I concur. It seems to me this matter turns upon the meaning which should be given to the words "within four months from the cause of action the action shall commence" and decide when an action can be said to have commenced; with the issue of the summons or upon service so as to interrupt prescription within the meaning of the section of the Act (*supra*).

The general rule is that an action begins with the issue of a summons this being known as a judicial interpellation having the effect of arresting the course of prescription but the summons must be served and an unserved summons is not a judicial interpellation so as to interrupt prescription. It is admitted that service was effected more than four months after the cause of action arose. I cannot see how appellant on the issue of the summons can be said to be in the position of a person who has brought an action so as to escape the bar of prescription.

Prescription in the sense in which it is used here is to be strictly construed.

The respondent is a Native constable. The clear intention of the present Act, as the Native Commissioner observes, is to limit the time in which actions must be brought against members of the police force.

I am of opinion the appellant is out of Court.

The appeal is dismissed with costs.

HARRIES, Member of Court: I concur.

P. KA I. SEME v. NTOBEYA MAKOSI MLANGENI.

1930. *May* 23. Before STUBBS, President, C. N. MANNING and L. GANE, Members of the Court.

Extension of time within which to note appeal.—Rule 6 *Government Notice No.* 2254 *of* 1928.—*Negligence by applicant.*

FACTS: In the matter of an application for extension of time within which to note an appeal from the decision of the Native Commissioner at Wakkerstroom.

Applicant, who is an attorney by profession, stated that he was away on official duty in Swaziland when the judgment was delivered and that he did not receive any communication from his

attorney that judgment was given against him in a case that was pending when he left his home. It appeared from the affidavits produced that communications were directed to him at his address in Swaziland but applicant denied having received these although there were no allegations that these communications had been returned by the postal authorities.

Held: That as there was no just cause shown and as the delay in bringing the action pointed to negligence on the part of applicant, the application could not be granted.

For Applicant: Mr. *G. Findlay*; for Respondent: No appearance.

Gane, Member of Court, delivered the judgment of the Court: The applicant applies for leave to appeal against the judgment of the Native Commissioner, Wakkerstroom. It appears that the case in which judgment was given against the applicant was heard on different dates and was completed on the 29th October, 1929, when judgment was reserved. The Native Commissioner was thereafter transferred and he forwarded a written judgment which was recorded at Wakkerstroom on 9th December, 1929, and apparently delivered on 18th December, 1929. The applicant's attorney was notified by the clerk of the court, and it appears from the clerk's affidavit that Mr. Attorney Sausenthaler "casually glanced at the judgment." The clerk states that he personally telephoned to applicant's office at Volksrust on 10th December, 1929, and was informed that applicant was then on his farm Sterkfontein.

The applicant left his farm for Swaziland on the 14th December, 1929. On the 10th December Mr. Attorney Sausenthaler telegraphed to him c/o Chief Sobhuza, Mbabane, that judgment had been entered against him and on 18th December, 1929, and 4th January, 1930, sent letters to applicant's P.O. Box number at Volksrust. The applicant denies that he received these communications, but there is no allegations that the communications have been returned by the postal authorities as undelivered.

The applicant is an attorney by profession and was also represented by an attorney in the trial Court. He well knew that judgment was pending and about to be delivered in the case in question but he took no steps to ensure that notification of the decision would reach him. He alleges that during the time he was in Swaziland he had not, and could not have any postal or

telegraphic connection with the Transvaal, and less still with his office. No convincing explanation is given of this allegation. It is well known that Mbabane is in regular postal and telegraphic communication with the Union, and it is practically certain that any communication addressed " c/o Chief Sobhuza " who is described in the affidavits as " King of the Swazi Nation " would be duly delivered. In the absence of a satisfactory explanation on these points the Court is of opinion that the indulgence asked for should not be granted, and the application for leave to note an appeal is refused.

SIGWAMBENI TSHEZI v. DINGINDAWO TSHEZI.

1930. *June* 9. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Rule 11 *of Rules of Courts of Native Chiefs framed under section* 71 *of Act* 49 *of* 1898.—*Absence of compliance with rules.*—*Pending case.*

FACTS: In the matter of an application for extension of time within which to note an appeal.

Where the case in respect of the application before the Court was dealt with by the Chief in September 1927, and where the applicant thereafter repaired to the office of the magistrate within the time limit prescribed by Rule 11 of the rules of courts of Native Chiefs framed under sec. 71 of Act 49 of 1898 and noted appeal but where there had not been proper compliance with the provisions of that rule in that the Chief and respondent were not notified of the intention to appeal.

HELD: That the remedy sought could not be accorded. If there had been compliance with the rule the matter would have resolved itself into a pending case in terms of sub-sec. (5) of sec. 17 of Act 38 of 1927, and therefore the case was brought to the wrong forum.

For Appellant: Mr. *H. P. Waller*; for Respondent: in default.

STUBBS, P. delivered the judgment of the Court: The case in respect of the application which is before the Court was, according to the applicant, dealt with by the Chief on the 24th September,

1927. Thereafter the applicant repaired to the office of the magistrate within the time limit prescribed by Rule 11 of the rules of courts of Native Chiefs framed under sec. 71 of Act 49 of 1898 and noted his appeal, but there has not been proper compliance with the provisions of that rule inasmuch as the Chief and respondent were not notified of the intention to appeal. At any rate there is nothing before us to show that there was such compliance. Had there been compliance it is probable that the matter would then have resolved itself into a pending case, in which case redress would lie from the proper forum.

The remedy sought cannot, therefore, be accorded by this Court.

MATSHEKETSHE MAJOZI v. SHIYA MKIZE.

1930. *June* 9. Before Stubbs, President, F. W. Ahrens and E. N. Braaevedt, Members of the Court.

Irregularity in procedure.—Non-compliance with rules of court.—Rule 6 *Government Notice No.* 2254.

Facts: In the matter of an application for leave to note an appeal from the decision of the Native Commissioner at Mapumulo.

Where in the affidavit it was not stated that the time within which to appeal has expired and where application was made for an extension of time to note the appeal and on the application being granted for leave to proceed with the hearing of the appeal forthwith and where there was entire absence of compliance with Rule 6 and other rules regulating procedure.

Held: That as the rules had not been complied with the Court had nothing before it to show that an appeal had been noted. Leave to hear the appeal on its merits was refused. The application for leave to note an appeal was granted.

For Applicant: Mr. *K. Thompson*; for Respondent: In default.

Stubbs, P. delivered the judgment of the Court: In the grounds for leave to appeal it is not stated, though it seems obvious from the Record, that the time within which appeal should have been noted from the judgment of the court below has expired. This

should have been alleged. The application before us now is merely for leave to appeal against the whole judgment of the Native Commissioner, and in paragraph 5 it is set out that application will be made to proceed with the appeal forthwith which I take to mean to proceed with the application at the present session.

While *prima facie* there would appear to be no reason to reject the application for leave to appeal, there is every reason to refuse the prayer in paragraph 5 as, from the information before me, there has been an entire absence of compliance with Rules 8, 9, 10, 11, 12 and 14.

There is nothing before me to show that an appeal has been noted in terms of Rule 6.

Mr. *Thompson,* for applicant, if I understand him correctly, now asks for extension of time within which to note the appeal.

There seems no reason why the application should not be granted, but in no circumstances can leave be granted for the prosecution of the appeal on its merits at this session for want of compliance with the relevant rules.

CHARLIE NXELE v. LEMFANA NXELE.

1930. *June* 17. Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Procedure.—Appeal from a Chief's Court.—Section 12 (3), (4) *and* (5) *of Act* 38 *of* 1927.—*Rules* 6, 7, *and* 8 *of Government Notice No.* 2255. Lobolo *claim.—Absence of evidence.—Costs.*

Facts: An appeal from the decision of the Native Commissioner at Pinetown.

Where the statement of claim sets out the judgment of the Chief to have been in the nature of an order against plaintiff in the court below to provide *lobolo* for defendant or to find him land, and where the Native Commissioner without taking any evidence upheld the appeal giving as his reasons that the Chief's report, filed of record, showed that the complaint rested entirely on the appellant's failure to provide the *lobolo* of respondent and that the question of land was merely a side issue and where the grounds

of appeal were that in terms of the Native Administration Act 38 of 1927 and the rules governed thereby the Native Commissioner should have dealt with the matter as a case of first instance and taken the whole evidence, and where it was clear from the grounds of appeal from the Chief's Court that the latter made an order for the return of *lobolo* or for provision of land.

HELD: That the object of the Legislature in the language of sec. 12 (3), (4) and (5) of Act 38 of 1927 read with Rules 6, 7 and 8, Government Notice, No. 2255, governing procedure was to invest the Native Commissioner's Court with functions of a two-fold character: (1) as one of appeal from a Chief's decision, and (2) as one of first instance for purposes of recording the evidence and of bringing any such matter dealt with by it within the purview and authority of the Native Appeal Court for purposes of appeal.

HELD, further, that the Native Commissioner should try out an appeal from Chief's Court as though it were one of first instance and that at the same time it should be indicated on the Record that it is an appeal to obviate a possible objection of *res judicata*.

HELD, further, that as it was clear from the Record that an alternative order for provision of land was made by the Chief that the issue be tried out properly in terms of the rules governing Native Commissioner's Courts in civil proceedings.

The appeal was allowed with costs. Costs incurred in the court below to be costs in the cause.

CASE REFERRED TO: *Ngqozomela Madonsela* v. *Makopela Mnguni* (N.A.C. 1929).

For Appellant: Mr. *Howard;* for Respondent: Mr. *Darby*.

STUBBS, P.: It is desirable that I should throw some light on certain aspects of procedure which seems to have been overlooked in this case, although this should not be necessary in view of the ruling in the case *Ngqozomela Madonsela* v. *Makopela Mnguni* (N.A.C. 1929), in regard to cases brought in appeal from a Native Chief to the Court of Native Commissioner in order that the dual character of the latter's functions should be more fully appreciated. The Native Commissioner in hearing an appeal from the former sits both as a Court of Appeal and a Court of first instance. Paradoxical though this may seem the object of the Legislature in the language of sec. 12 (3), (4) and (5) of Act 38 of 1927 read with Rules 6, 7 and 8 governing procedure in this regard was to invest the Native Commissioner's Court with

functions of a twofold character, (1) as one of appeal from a decision of a Chief, and (2) as one of first instance for purposes of recording the evidence and of bringing any such matter dealt with by it within the purview and authority of the Native Appeal Court for purposes of appeal.

It was therefore necessary that so far as concerns the Court of Native Commissioner it should be one of record as well as of first instance (the Court of Native Chief is not one of record) to try out and decide any such appeal as though it were a case of first instance at the same time care being taken to indicate on the Record that it is an appeal to obviate a possible objection of *res judicata*.

I hope this has been set out in sufficiently clear language to serve as a future guide to the Courts of Native Commissioner.

In the case before us the Native Commissioner would appear to have misconceived the position in that he has sought to deal with the decision of the Chief as a Court of appeal solely and in the process he has overlooked the terms of the section (*supra*).

The statement of claim sets out the judgment of the Chief to have been in the nature of an order against plaintiff in the court below to provide *lobolo* for defendant or to find him land.

The appeal was resisted by defendant. After hearing argument for the defendant the Native Commissioner without taking any evidence upheld the appeal, giving as his reasons that the Chief's report, filed of record, showed that the complaint rested entirely on the appellant's failure to provide the *lobolo* for the respondent and that the garden was merely a side issue. Such being the position the decision of the matter in issue turned on one of law which the Chief in the decision he gave had overlooked. Then follows a statement of the legal ground on which he allowed the appeal and set aside the Chief's judgment. It may as well be here reproduced for convenience of discussion: "In view of this and the weighty and numerous decisions reported in the Native High Court Reports that the provision of *lobolo* by a kraalhead was an optional and moral and not a compulsory and legal obligation no purpose could be served by leading the evidence in the case to decide a decided point of law."

The main grounds of appeal are:—

> "In terms of the Native law and the Native Administration Act the Native Commissioner should have dealt with the matter as a case of first instance and taken the whole evidence.

"Appellant's claim was for restoration of a certain piece of land approximately 5½ acres which for due consideration respondent gave to him but from which he subsequently wrongfully and unlawfully and by force ejected Appellant."

It is clear from the second of the above grounds of appeal that plaintiff's (appellant in this Court) claim according to the judgment of the Chief recorded in the Native Commissioner's Court was for the return of *lobolo* or for provision of land whatever that may mean. It is equally clear from the statement of grounds of appeal from the Chief's Court that an alternative order to find him lands was made by the Chief. The Native Commissioner in his anxiety to give weight to the Native High Court decisions quoted by him seems to have entirely ignored this aspect of the case.

The appeal is allowed with costs. The judgment in the Native Commissioner's Court is set aside and it is ordered that the issue be tried out properly in terms of the rules governing Native Commissioners' Courts in civil proceedings, costs hitherto incurred in the court below to be costs in the cause.

AHRENS, Member of Court: I concur.

BRAATVEDT, Member of Court: I concur.

DANIEL NDIMANDE v. JEREMIAH NDIMANDE.

1930.—*June* 17. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Gratuitous loans between Native and Native.—Loan as distinguished from a mandate.—Section 2 of Act 41 *of* 1908.—*Intention of the Legislature.—Application of the canons of restrictive interpretation in ascertaining the intention of the Legislature.—Costs.*

FACTS: An appeal from the decision of the Native Commissioner at New Hanover.

Where appellant at the request of the respondent discharged a money liability due by the respondent to a third party, and respondent, on being sued by the appellant for the disbursement and expenses he had been put to in discharging this mandate, pleaded

that the transaction was substantially one of money-lending in terms of the Natal Act 41 of 1908, and that, as the formalities required by that Act had not been observed, no action lay for the recovery of the amount claimed, and where it was argued by counsel for respondent that the transaction between the parties was substantially that of money-lending and unless reduced to writing and signed in the presence of a magistrate or justice of the peace was unenforceable in a Court of Law in terms of the Act (*supra*), and where the Native Commissioner upheld this plea, and further where the appellant in order to discharge his mandate had to borrow money at interest; payable by himself.

Held: That the transaction under consideration did not fall within the purview of the Act in that the transaction was not a "loan" either in form or in substance but a mandate in the strictest sense of Roman law and Roman-Dutch law as distinguished from a *mutuum* or money loan and under Roman system of procedure would have been enforceable at the suit of the appellant as *mandatarius* against the respondent as *mandans*. The transaction was therefore quite gratuitous, and not one of money-lending.

Held, further: That the mere fact respondent enjoyed a benefit by reason of the transaction and that to that extent it had an important feature in common with a loan, was not conclusive as the principal sum disbursed by appellant was earmarked for a particular purpose under the mandate whereas if it had been paid to respondent as a loan the latter would have had the free and unrestricted benefit of its use.

Held, further: That sec. 1 of Act 41 of 1908 is restrictive and not extensive in that its effect is to limit the operation of subsequent provisions of the Act to the transactions specified in the section and that if it was not a mandate it was not a money-lending transaction so as to bring it within the four corners of the Act.

The appeal was sustained. The judgment of the trial Court was set aside and the case remitted to the Native Commissioner for trial to its completion.

Costs in favour of appellant in both Courts.

For Appellant: Mr. *R. J. Harrison*; for Respondent: Mr. *Howard*.

Stubbs, P.: The facts in this case are simply that the appellant at the request of the respondent discharged a money liability due

by the respondent to a third party, and respondent, on being sued by the appellant for the disbursement and expenses he had been put to in discharging this mandate, pleaded that the transaction was substantially one of moneylending in terms of the Natal Act 41 of 1908, and as the formalities required by that Act had not been observed, no action lay for the recovery of the amount claimed. The Native Commissioner, New Hanover, upheld this plea.

The simple issue in the case is whether the transaction does fall within the mischief of the Act.

The cardinal enactment and intention of the Act is to make unenforceable against a Native transactions which are clearly in form and substance transactions of moneylending, or transactions which are substantially, though not in form, transactions of moneylending, unless certain formalities prescribed by the Act have been complied with.

The enactment has certain characteristics which indicate clearly that it should be restrictively interpreted. In the first place it necessarily involves a substantial alteration of the common law, both that of the Natives in Natal, and the common law of the European, under which normally a loan is recoverable irrespective of the form the transaction took.

Secondly, the Act, especially sec. 2, if literally interpreted, may give rise to manifest injustice, as is sharply illustrated by the decision now under review.

This being so, the canons of restrictive interpretation clearly fall to be applied in ascertaining the intention of the Legislature.

It seems that there are two grounds upon which this Court may justly conclude that the transaction under consideration does not fall within the purview of the Act. The first and narrower one is this, that the transaction was not a "loan", either in form or in substance. It was a mandate, both in form and in substance, in the strictest Roman law sense, as distinguished from a *mutuum*, or money loan; and under the Roman system of procedure would have been enforceable at the suit of the appellant as *mandatarius* against the respondent as *mandans* by the *actio mandati contraria*. The *actio mutui*, which was the action appropriate to enforce a loan, would in the circumstances of this case, not have lain. See *Inst.* (III 4 pr.), and (III 4.5); Hunter, *Roman Law* (4th ed., p. 490). The definition of mandate is thus formulated by Hunter, at p. 492: "Mandate is a contract in

which one person (*mandatarius*), promises to do or give something, without remuneration, at the request of another (*mandans*), who on his part undertakes to save him harmless from all loss." The applicability of this definition between the appellant and respondent is clear. In order to discharge his mandate, the appellant had to borrow money at interest, payable by himself and although the liability for interest arose, this was part and parcel of the expense of carrying out the mandate; and as between the appellant and respondent, the transaction was quite gratuitous, and in the strictest sense one of mandate. The principles of Roman law here relied upon have been taken over into Roman-Dutch law (*Voet*, XVII, 1, 2 and 4) and are the foundation of the modern law of agency, notwithstanding that the latter has been substantially widened and enlarged by commercial practice and the adoption of a great deal of the English law. For purposes of the problem now before the Court, it seems perfectly legitimate to apply these Roman and Roman-Dutch principles to arrive at the true juristic nature of the transaction. If it is argued that the practical result of the transaction is the same as if it had been a loan by appellant to respondent, namely, an indebtedness in a sum of money, and that therefore the transaction was substantially one of loan, the answer is that there are dozens of widely differing unilateral contractual transactions which would have the same result for practical purposes. The mere fact that respondent enjoyed a benefit by reason of the transaction, and that to that extent the transaction had an important feature in common with a loan, is not conclusive, or indeed sufficient. See *Rex* v. *Goedhals and de Wet* (1909, S.C. 545, at p. 554).

It is noteworthy here that the principal sum disbursed by the appellant was earmarked for a particular purpose under the mandate, whereas if it had been paid to respondent as a loan, the latter would have had the free and unrestricted benefit of its use.

Where it is provided in Sec. 1 that the provisions of the Act shall apply to transactions which "whatever their form may be, are substantially ones of moneylending" it is reasonable to understand this expression to refer to such transactions which are for ulterior motives of one or both of the parties, disguised in form, as an example of which may be cited the familiar device of disguising what is in substance a transaction of pledge as a sale. Our reports are full of such and analogous cases, and the maxim applic-

able is *Plus valere quod agitur, quam quod simulate concipitur.* See the cases cited in illustration of this principle in *Mackeurtan* on *Sale*, at pp. 21 and 23. It seems that the concluding words of sec. 1 are merely a statutory application of the above maxim, and as it cannot be suggested that the form of the transaction between appellant and respondent, namely, that of mandate, is not a true reflection of their intention, the transaction is not affected by sec. 1.

But if the reasoning involved in the first and narrower ground is faulty, and is not justified even by the clear necessity of a restrictive interpretation of the provisions of the Act, there is a second and broader ground, less open to the possible criticism of being academic.

It may be assumed for purposes of this ground, that the transaction between the parties was substantially one of loan, or was actually a loan. The further question arises whether it was a transaction of " moneylending ", for if it was not, then by virtue of the provisions of sec. 1, the Act does not apply. Everything depends upon the meaning to be attached to the term " moneylending ". *Prima facie* a word must be given its natural and best known meaning in an Act, but a word is generally capable of a large number of different shades of meaning, used in different contexts, and with reference to different sets of circumstances. Now considered by itself, it seems clear that the words moneylender and moneylending in their natural significance, connote a business of lending money for profit, or at interest. A person who lends money gratuitously to a friend or relation or to anyone, not as a matter of business, is never in ordinary language referred to as a " moneylender ". It is not necessary to go so far as to say that moneylending necessarily connotes a usurious rate of interest. The meaning assigned to the word " moneylender " by the Imperial Dictionary of the English language is " one who lends money on interest ", and no other meaning is assigned. Compare also the statutory meaning to the term in the English Moneylending Act of 1900, and the Union Usury Act. If then this is the natural meaning of the word as used in sec. 1, its effect is to exclude from the operation of the Act gratuitous loans.

But if the word is capable of including gratuitous loans in its connotation, or if this meaning may be regarded as its literal meaning, then the word is ambiguous or equivocal in its context; for " moneylending " is at least capable of the meaning " lending

money at interest," which is the sole dictionary meaning, and the common statutory one; and to resolve the ambiguity regard must be had to external circumstances, the history and cause of the enactment, the consequences to which a literal interpretation of the keyword may lead, and to the general policy and intention of the Legislature in passing the enactment. Maxwell on *Interpretation of Statutes*, at p. 35 *et seq.* The literal construction has only a *prima facie* preference, which may be displaced by a variety of circumstances and rules of construction. *Farrar's* case (1926, T.P.D. 501). The circumstances and rules which are fairly applicable to the construction of this Act, and in particular to a determination of meaning to be attached to the word "moneylending" assuming that its literal meaning is simply synonymous with lending money, may now be dealt with *seriatim.*

In the first place it is now settled law that the title of the Act is part of the Act itself, and may be used to throw light on the construction of doubtful portions of the Act. "An Act to regulate claims against Natives for interest" shows *prima facie* that the intention of the Legislature was to deal with interest-bearing loans or transactions, and is an indication that "moneylending" is meant to refer to such loans. Had the intention been to go further and regulate loans simply, it would have been natural to expect a title such as "To regulate loans to natives." This consideration alone however is not conclusive, for although the title or preamble of an Act may indicate the particular evil which is aimed at, the enactment itself may both consistently and wisely be extended beyond the cure of that particular evil. See *Maxwell*, at pp. 82, 83, and the cases there cited. But there are other considerations which lend support to the inference suggested by the title.

In the second place, it is permissible, and indeed necessary, where the scope of an Act is doubtful, to have regard to the circumstances existing at the time of the enactment, with reference to which it was passed and out of which an evil arose which the Act was designed to combat. Ambiguous words will then have their meanings determined with reference to the scope, the mischief and the subject-matter of the Act. The historical circumstances surrounding the Act will no doubt be regarded as so notorious as to be a proper subject of judicial notice by a Court sitting in the Natal Province, and these circumstances clearly indicate that the Legislature aimed at the suppression of money-

lenders' activities, which were at that time (in 1908) oppressively in evidence amongst the natives, the moneylenders being Asiatics or Europeans who were in a position to overreach the ordinary native with great ease. It is known that the ordinary native does not understand the theory of interest, and the dangers to themselves inherent in usurious dealings; whereas "friendly" loans without interest are a familiar and recurrent feature of their transactions amongst themselves, which stood in no need of legislative regulation and gave rise to no notorious evil, or any evil at all. It is therefore a fair inference that it was not intended to attack, alter, or regulate these friendly loans, and that they fall outside the purview of the Act. To this aspect of the enquiry the remarks of the learned Judges in *Mtembu's* case reported at p. 129 of the reports of the Native High Court for 1916, are strongly in point.

One may even go so far as to say that the Act, if it is construed so as to include a friendly gratuitous loan, would instead of eradicating a known evil, give rise to one perhaps greater.

A construction which gives rise to manifest inconvenience or injustice is to be avoided if the enacting words are fairly capable of sustaining a meaning which will not lead to such a result.

The Courts constituted under Act 38 of 1927 have in Natal jurisdiction in civil matters over a Native population of approximately one and a half millions. A large proportion of these people live under tribal forms of government subject to Native law and custom. They are without education and live the life of the kraal and the open veld. From the beginning of Bantu history it has been the custom among them to accommodate one another in the matter of loans in kind, *e.g.*, cattle with which to *lobola* a wife, goats to pay a medicine man and when later our currency spread to them, money gradually took the place of the former. Never, however, were loans either in kind or in money made with interest which is unknown amongst the Natives. The most usual form of loan is gratuitious, no charge of any description is as a rule made.

Some of the types of loan common with Natives might here be exemplified:—

> X is arrested and convicted for failing to pay Poll Tax or Dog Tax. Y his brother comes to his assistance and pays the fine and the Tax.

X loans Y his brother £50 with which to buy cattle to *lobola* the daughter of Z.

X a medicine man attends the sick child of Y. Z, Y's friend advances X's fee.

X is in danger of being sold up by Y for debt. Z his elder brother at his instance pays the debt (as in this case).

In all these examples the transactions, if the reasoning in the cases relied upon by counsel for respondent is followed to its logical conclusion, are substantially ones of moneylending and unless reduced to writing and signed in the presence of a magistrate or justice of the peace are unenforceable in a Court of law. Now before the Act (*supra*) came into operation loans of the nature set out above were, as I have already pointed out, of common occurrence amongst Natives. They led to no mischief. They usually sprang from motives of friendly interest in, and concern for the well-being of the individual. Could it have possibly been the intention of the legislative faculty to disturb this entirely satisfactory state of affairs by throwing the door open to an abuse of legitimate obligation by enabling many thousands of natives to escape liability to repay moneys owing in the circumstances detailed above? Where lies the evil? What evil was sought to be remedied in transactions of this and others of similar nature?

I should have been content to allow the matter to rest here but as the Native Commissioner in his reasons for judgment has said that he has been guided in his decision by the case *Kumalo* v. *Newana* (N.P.D. 1929) and counsel for respondent rests his contention mainly on that decision and emphasises its confirmation by the Appellate Division and further relies on the recently decided case *Hosea Veni v. Francis* (N.P.D. 1930), I am constrained to discuss these in the light of the foregoing remarks because of their direct bearing on what has been said. In the process I find myself in an extremely delicate and unenviable position, one which I approach with the greatest diffidence, but one which from my understanding of the law in its relevancy to the Natives as a whole in Natal and to the nature of the transaction in this case in particular I cannot escape, and if in doing so I would seem to presume to a better judgment of the legal exigencies and implications I at once disclaim any such intention.

Turning then to a criticism of the cases which have decided that the Act is generally applicable to all loans, and taking first the case of *Kumalo* v. *Newana* (*supra*), it seems that the fallacy

underlying that decision is the ruling of the Court that the words in sec. 1, " every transaction which is substantially one of moneylending ", are words of extension, not of restriction. They are words of extension as far as sec. 1 is concerned, in so far as they bring within the purview of the Act transactions which are not in form ones of moneylending, but are in substance such, and have the characteristics of such transactions. But there the extension stops. The section as a whole is restrictive, in that its effect is to limit the operation of the subsequent provisions of the Act to the transactions specified in the section. *Inclusio unius est exclusio alterius.* By specifying the transactions to which the Act is to apply, transactions not falling within that specification are impliedly excluded. It follows that " loans " mentioned in sec. 2, means loans which fall within the purview of sec. 1 namely, loans that are substantially moneylending transactions. A more general criticism of that decision is that the Court has ignored the circumstances with reference to which the Act was passed, and the evil at which it was aimed. This would have been justifiable if the words of sec. 1 had been susceptible of one meaning only, for in such case the rules of interpretation do not permit an obvious and unequivocal meaning to be displaced by any external circumstances. But surely no person would so far fly in the face of ordinary usage of language as to find that " moneylending " means and can mean only " all transactions of loan."

Proceeding to the Appellate Division decision, under the same name, that Court discounts the argument based on the wording of the title in these words: " It is quite true that the title of the Act is ' to regulate claims against natives for interest,' but on any interpretation this title is not wide enough, as loans bearing interest are certainly recoverable under the Act, even under the contention of the appellant, and certainly in terms of sec. 2. This reasoning involves reading the word " regulate " in the title to mean " prohibit ", which is not permissible—see *Virgo's* case (1896, A.C. 88), where it was held that a power of regulation did not involve a power of prohibition. The Act does not purport to prohibit loans at interest, but to prescribe conditions under which they shall be enforceable, which is a true function of " regulating."

The Court then proceeds to deal with the argument based on the use of the word moneylending in sec. 1: Roos, J.A. says: " It is said that moneylending is something different to such terms as ' lending money ' or ' loan of money ', and that this difference

is that ' moneylending ' implies the lending of money at interest. In other words if the rate of interest charged were one per cent. per annum, the loan would be moneylending under sec. 1, but if no interest were charged the transaction would not fall under the Act. This seems unsound. In some cases ' moneylending ' and ' moneylender ' might apply to a transaction which is usurious, and to a person who is a usurer, but if the term is used generally and if it is conceded that it applies to a transaction bearing the smallest conceivable interest, it cannot be excluded from also covering loans not carrying interest. In our view therefore, ' moneylending ' here conveys the same meaning ' lending money ' would convey. Throughout the rest of sec. 1 the term loan is used as conveying the same meaning."

This reasoning is open to the criticism in the first place that it quite ignores the primary or common dictionary meaning of the word moneylending, and refuses to accord it that meaning because it does not appear from the Act what, if any, minimum rate of interest is necessary to turn a loan into a moneylending transaction. If this reasoning were correct, it would be necessary to say that in ordinary usage " moneylending " cannot mean lending money at interest because its ordinary meaning does not include any particular, or minimum rate of interest except perhaps the vague one of an interest which is considered profitable by a particular moneylender, a figure which may vary a great deal in individual cases.

Again, if it is true that amongst the Natives of Natal, loans are common between themselves, but not at interest, it must be assumed that the Legislature was aware of what was common knowledge. It may well have been content to refrain from fixing by legislation what constituted a rate of interest that would make a loan into a moneylending transaction, inasmuch as the only loans made to Natives bearing interest at all would normally be made by the class of person against whom that Act was directed. (It is significant in this connection that sec. 3 provides that the Native borrower shall sign or make his mark, while the endorsement shall be signed by the lender. It is apparently not contemplated that the lender will be of that class of person who may only be able to " make a mark " by way of signature) who, it may safely be assumed, would advance money at a nominal, or non-profitable rate, still less at the " smallest conceivable rate." It is however, significant that the Act does fix a maximum rate

of interest, namely 15 per cent, secs. 4 and 5. Put simply, the Legislature seems to have meant: "We will allow legitimate moneylending subject to certain safeguards to the Natives' interests. We will ensure that he understands that he is being charged interest, and what this means—our magistrates must explain this to all Native borrowers from moneylenders. But he must not in any case be charged more than 15 per cent. It is not necessary for us to fix a minimum. We can be assured that moneylenders will look to their own interests in this respect. Our object in this Act is to protect the Natives' interests and obviate a certain evil which we find has grown up."

His Lordship then quotes with approval the reasoning of MATTHEWS, J., in the Natal Provincial Division case cited *supra*. exempting from the operation of the Act advances made by employers to Natives in return for labour. "Such advances", it is said, "do not generally bear interest, and the exemption would be unnecessary if the Act only refers to loans carrying interest". But this reasoning ignores the fact that interest may be exacted on other than a percentage basis, and it is not only conceivable, but highly probable, that in many cases the value of the work or labour given to an employer in return for an advance may be considerably greater than the amount of the advance, and the difference equivalent to a highly usurious rate of interest.

But it seems that the policy of the Act is not directed against employers of labour, and the Legislature seems to have felt that the known practice of making advances of money in anticipation of services rendered, was an innocuous one, not abused, or likely to be made an instrument of oppression by employers; that it was unnecessary in the interest of Natives to impose similar restrictions in relation to such advances, and highly inconvenient from the standpoint of employers of Native labour. Hence the presence of this exemption in the Act. The inference drawn by his Lordship is by no means a necessary one, and on the whole seems unjustifiable.

His Lordship then proceeds: "Apart from all this, the protection afforded by the Act would fall away if a person could sue on a note which *ex facie* does not include interest. However greatly a Native may protest that it carried interest the note might prevail." But his Lordship seems to have overlooked the provisions of sec. 3 that the net sum borrowed, and the rate of interest, and other charges, must be separately specified in the body of the

note, and a verifying statement made and signed by the lender on the back of the note before a justice of the peace or magistrate; and a misstatement in this connection is made a crime by sec. 8, in addition to which the lender forfeits his right to recover either principal or interest. The contingency referred to by his Lordship is therefore specifically guarded against by the Act, and his Lordship's criticism falls to the ground.

There remains to be dealt with the case of *Mlotsha* v. *Wilson* (N.P.D., Feb. 20, 1929). This case rules, practically without argument, and on very scanty authority that the Act covers gratuitous loans, and it also decides that a transaction very similar to the one under review now, that is to say one of mandate, is substantially a loan. It seems, with reference to the latter point, that the Roman and Roman-Dutch law distinction between a loan and a mandate was not put before the Court and received no consideration. Nor indeed does this argument appear to have been advanced in any of the decided cases. With regard to the first point decided, not only was there no argument, but it does not seem to have occurred to the Court that there was any need for a restrictive interpretation being applied. The same criticism indeed may be applied to the Appellate Division decision, the judgment in which seems deliberately to give the widest possible interpretation to the terms used in the Act, regardless or in spite of the possible consequences of such wide interpretation, and in fact regardless of the proved consequence in the very case under appeal. The consequence in this case is a normal one, which may be expected to arise again and again. It is not an isolated case arising out of unusual circumstances—one of those hard cases which are said to make bad law.

It may fairly be claimed on behalf of the Members of this Court, that they are judicially cognisant to the fullest degree of the conditions of Native life, and the operation in practice of the supposed requirement of the Act that every single transaction of loan between Natives should be hedged about with formalities involving going before a magistrate or justice of the peace, and whether this would be practicable or would involve intolerable hardship, in a large number of cases. The Court may well be in a position to discount the observation of Tatham, J., in *Hosea* v. *Francis* (*supra*) that " the Act may work hardship in particular cases, but the lender can always protect himself by the method which the Act prescribes."

The Native Commissioner has elected to brush aside the ruling of this Court in the case *Dick Kuzwayo* v. *Mpehlela Ngcobo* (N.A.C. 1929) in favour of the contrary view. This he was not entitled to do.

The appeal is sustained. The judgment of the trial Court is set aside and the case remitted to the Native Commissioner for trial to its completion. Costs in favour of appellant in this and in the lower court.

Ahrens, Member of Court: In concurring in the judgment of the learned President in which he has dealt with every aspect of the legal position most exhaustively, I desire to say that from my long experience in Natal and Zululand, if we were to hold otherwise in the case before us, a distinct hardship and injustice would be created among thousands of natives, many of whom would be required to walk up to fifty miles or more to the nearest office of magistrate or justice of the peace to have a loan of say, 5s. or 10s. or more, from brother to brother, relative to relative, friend to friend, validated in terms of the Act and it would be necessary to employ additional clerical assistance on a large scale in order to cope with the requirements of the Act. It is practically an every day occurrence where fines are being met by friends or relatives of a convicted person, who usually advance the amount of such fine gratuitously.

It is true that advances of money by an employer to be repaid by the labour of the native to whom advances are made are exempted from the requirements of the Act. But there is cogent reason for this. It is well known that at the time when this Act was passed, nearly every other farmer or native employer on mines, sugar or tea estates, wattle plantations, etc., in order to secure labour, had to advance money to such native and, if this Act had not exempted them, there would have been a constant procession of such employers of labour, to the office of the magistrate or justice of the peace in order to bring their loans within the scope of the Act.

This Court is bound by its decision in the case of *Dick Kuzwayo* v. *Mpehlela Ngcobo* and, in order that it may be justified in disregarding its decision, it must be, in the opinion of the Court, a wrong decision, being either contrary to law or contrary to reason. Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development, and the evils of

the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreserved, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it; important contracts may have been made on the strength of it; it may have become to a great extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision, though founded in error shall stand inviolate none the less. *Communis error facit jus*, (Salmond's *Jurisprudence*—6th Ed., at page 166).

On the face of it, it would appear that sec. 2 of the Act is quite clear and unambiguous, but, on closer scrutiny of the whole Act, the picture, otherwise clear, is thrown out of focus.

Sec. 8 of Law 44 of 1887 which is repealed by the present Act made the following provision:

> "That no judgment shall be given in any Court of law against any Native founded on a promissory note, bill of exchange or mortgage bond or other liquid document of debt unless such promissory note, bill of exchange, mortgage bond or other liquid document of debt, shall have endorsed thereon, or attached thereto, a certificate signed by a Resident Magistrate or a Justice of the Peace, to the effect that the native sought to be charged thus, signed his name or made his mark in the presence of a Resident Magistrate or of a Justice of the Peace after the same has been explained to him by the said Resident Magistrate or Justice of the Peace."

It is quite obvious that the section now referred to did not regulate claims against natives for interest and did not protect the native from unscrupulous moneylenders, as there was nothing to prevent the lender from advancing, say £3 only and charging £3 interest and then instruct the native to repair to the magistrate or justice of the peace and get the document executed as for say £6 or more. It is within my knowledge that natives were charged up to 500 per cent. interest or even more. There was no provision in the old Law making it obligatory on the part of the lender that before the document is signed by the native it must have endorsed thereon a statement signed by the lender that the actual sum lent and the other particulars contained in the document are truly set forth, which provision has now been introduced in the present Act.

What was otherwise the intention of the Legislature in introducing the new Act, but to regulate claims against natives for interest as its title reads?

Sec. 3 of the present Act requires that the net sum borrowed, the rate of interest and other charges whether by way of commission or in any other manner, must be separately stated and before the document is signed by the native it must have endorsed thereon the statement by the lender, that the actual sum lent and other particulars contained therein are correct. It makes it the duty of the magistrate or justice of the peace in every case to satisfy himself that the document shows the real nature of the transaction between the parties, and, if there be reason to doubt that such is the case, or if the transaction be illegal, the document may not be attested.

Then we come to sec. 6. This provides that when any native is sued for the recovery of a loan it shall be the duty of the Court to make enquiries, and, if need be, to call witnesses, in order to satisfy itself as to the actual amount of money lent, and the amount of interest or other charges in respect thereof. Although a document sued upon may meet the requirements of sec. 3, still it is incumbent on the Court to satisfy itself as to the interest and other charges.

What was otherwise the intention of the Legislatore in introducing the new Act but to regulate claims against natives for interest, and all this supports the title of the Act which reads: "To regulate claims against natives for interest," which is an important part of the Act—see *Sheeley* v. *Registrar of S.C.* (T.P.D.) (1911, T.P.D. 298). I have therefore no doubt in my mind that the Legislature in framing and passing this Act aimed at the protection of the large number of improvident and unsophisticated natives from the usurious and fleecing tendencies of certain unscrupulous moneylenders and not at gratuitous loans as in this case, as otherwise the Act would be reduced to an absurdity. The case of *Venter* v. *Rex* (T.S. Ct. 1907, at page 910) is in point, where it was held that where to give the words of a statute their ordinary meaning would lead to an absurdity so glaring that the Legislature could not have contemplated it, or to a result contrary to the intention of the Legislature as shown from the context or otherwise, the Court may so interpret the language of the statute as to remove the absurdity, and give effect to the intention of the Legislature.

BRAATVEDT, Member of Court: I agree with the judgment of the learned President for the reasons given by him.

The Native High Court in the case *Alfred Mtembu* v. *Philip Mtembu* heard in 1915, and this Court in the case *Dick Kuzwayo* v. *Mpehlela Ngcobo* (N.A.C. 1929) have held that the terms of Act 1908, do not apply to gratuitous loans between Native and Native living under Native law. The reasons for these decisions have been amplified by the learned President in the present case. Obviously the position would be intolerable if it were held that gratuitous loans of the description stated were contemplated by the Act. Natives in difficulties very frequently obtain loans from relatives and friends and there must be thousands of such cases as the one in point in Natal alone. One can picture the hardships which would result in the case, for example, of Natives living in Zululand forty or fifty miles from the nearest magistrate if all such loans were to be reduced to writing.

The Act was passed at a time when an attempt was being made to ameliorate the conditions under which the Natives were living. It was meant for the protection of the Natives. It was one of the results of the Native Affairs Commission which was appointed because of the Bambata Rebellion of 1906. The Legislature obviously did not intend to inflict hardships, but to remedy them. To hold that the Act does apply to cases of gratuitous loans would result in untold hardships, and would encourage roguery and dishonesty.

Mr. *Howard* admits that the Act does not apply to gratuitous loans between Natives living under Native law. The parties to this action are Natives living under Native law. When the appellant came to respondent's assistance and raised money on his own property in order to extricate respondent from a difficult position he did so from motives of affection, and there was no mention of interest. He, however, has to pay interest of 8 per cent. on the money which he succeeded in obtaining for respondent's benefit, and he is claiming that interest from respondent. Such interest is not interest as contemplated by the Act. It is simply part of the gratuitous loan by appellant to respondent. Such being the case the whole claim is one for the repayment of a gratuitous loan by one Native who is subject to Native law against another Native who is also subject to Native law.

It is difficult to understand the total lack of gratitude displayed

by respondent who now seeks to escape liability by sheltering himself behind the provisions of Act 41 of 1908. If he were to succeed we would open the door wide to thousands of Natives to avail themselves of similar means of escape from their just liabilities.

MAWULUKUHLANA NZAMA v. MAFINDO NZAMA.

1930. *June* 17. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Return of lobolo *cattle loaned by one house to another.—Section* 3, *Act* 7, 1910 (*N*).—*Section* 182 *of Schedule to Law* 19 *of* 1891.

FACTS: An appeal from the decision of the Native Commissioner at Ndwedwe.

Where appellant claimed from respondent, his half-brother, the return of eleven head of cattle being cattle alleged to have been taken by the parties' late father from appellant's house and used for the benefit of respondent's house in that their father used the said cattle to *lobolo* respondent's mother; and where attention was drawn to sec. 3 of Act 7 of 1910 in that "the decision of the Chief or District Headman shall be subject to the usual appeal to a magistrate but no further appeal shall be allowed."

HELD: That as the case amounts to a claim for the return of *lobolo* loaned by one house to another it was not a *lobolo* transaction purely and simply between the bridegroom and the girl's father or guardian and therefore sec. 3 of Act 7 of 1910 did not apply when read with sec. 182 of the Schedule to Law 19 of 1891. It was decided that it was competent for the Court to hear the case.

CASES REFERRED TO: *Ukwekwana* v. *Matyana* (N.L.R., vol. 19, p. 152; (2) *Key Phillip Zwane* v. *Muziwane Zwane* (1930, N.A.C. Prentice-Hall, R. 61).

For Appellant: Mr. *R. I. Darby*; for Respondent: Mr. *D. L. Forbes.*

AHRENS, Member of Court, delivered the judgment of the Court: The plaintiff in this matter claimed from the defendant before Chief Mkonto, Ndwedwe District, 11 head of cattle, being cattle

alleged to have been taken by the parties' late father Ntelezana, from the plaintiff's house and used for the benefit of defendant's house and the Chief found for plaintiff for one head of cattle and costs. This judgment was sustained by the Native Commissioner.

The plaintiff now appeals against this decision.

The Native Commissioner in his reasons draws attention to sec. 3 of Ordinance 7 of 1910, presumably he means Act 7 of 1910. This section must be read with sec. 182 of the Code. In the case of *Key Phillip Zwane* v. *Muziwane Zwane* heard before this Court on the 5th April, 1930, it was held that this section contemplates *lobolo* transactions purely and simply as between the bridegroom and the girl's father or guardian.

The present case amounts to a claim for the return of *lobolo* loaned by one house to another and the section of the Act quoted by the Native Commissiner does not apply in this case, and this Court is competent to hear the appeal, in view of the ruling in that case.

The parties are half-brother, sons of the late Ntelezana. Appellant is the heir to the Indhlunkulu and the respondent belongs to a junior house in the Indhlunkulu section of their father's kraal.

The appellant alleges that during his youth his father Ntelezane used the *lobolo* cattle of his sister Ngculu to marry Ntomutwebu, respondent's mother and he now claims the return of these cattle.

The respondent, although denying this arrangement, admitted under cross-examination that one of Ngculu's cattle was used to complete the lobolo of his mother.

The late Ntelezana died over thirty years ago and the long delay in bringing the action has not been explained to our satisfaction. The claim is of ancient origin and like most such claims, is very difficult to establish clearly and requires the closest scrutiny.

The appellant calls four witnesses, viz.: Mampungutshe, Masinyana *alias* Didinga, Nyoka and Magwababa.

Nyoka admits that his evidence as to the cattle is hearsay.

Magwababa states that he does not know how many cattle were used and then under cross-examination he admits that he does not know anything about the cattle and that he only heard from the *mkongi* that seven head had been paid.

His remaining two witnesses, Mampungutshe and Masinyana *alias* Didinga, whose evidence was taken on commission, do not help him either. They both speak to certain seven head of cattle as having been paid as part of Ntomutwebu's *lobolo* and both

resented respondent's cross-examination, which fact invites this Court to treat their evidence with a certain amount of suspicion. They were both unable to describe the cattle and their evidence is contradictory. The former first stated that these cattle " did not actually go, they were reported verbally " and that only one beast went to the kraal but ran back, and later she says that seven head of cattle were driven off on the day of the wedding, but one beast returned. When the latter was asked who had driven the cattle she refused to answer and became very annoyed.

The appellant has therefore failed to establish his claim beyond the beast which the respondent has admitted.

The appeal is dismissed with costs.

DAMU LUTULI v. NTENGO LUTULI.

1930. *June* 18. Before STUBBS, President, AHRENS and BRAATVEDT, Members of the Court.

Ukungena Union.—Binding marriage.—Interference of general heir.—Dissolution of union.—Intervention of Court.

FACTS: An appeal from the decision of the Native Commissioner of Ndwedwe.

Where respondent is the father of appellant and of one M who is deceased. Appellant is the son of respondent's chief wife. M was the son of the second wife. Appellant " ngenaed " the widow of M at respondent's request. After two months the woman left appellant as a result of ill-treatment. Appellant alleged that respondent had handed the woman over to someone else and as general heir of respondent he applied for an order in the Native Commissioner's Court prohibiting the respondent from doing so; the application was refused; and where the question of the status of a woman who entered into an ukungena union was raised.

HELD: That ukungena is not a marriage and is not binding. It is entered into for an express purpose, viz., to provide an heir or to increase the estate of the deceased husband. The intervention of a Court is not essention to its dissolution. The woman may, with consent, break off the union and marry anyone who pays *lobolo* for her.

Held, further: That as appellant was not the kraalhead he had no right to bring the application.

The appeal was dismissed with costs.

For Appellant: Mr. *Forbes;* for Respondent: *In Person.*

Braatve t, Member of Court, delivered the judgment of the Court: The respondent is the father of appellant, and of one Mcoboza who is deceased. Appellant is the son of respondent's Chief wife. Mcoboza was a son of the second wife. Mcoboza married, begot two children, and then died. Appellant then " ukungenaed " the widow at respondent's request. He cohabited with her for two months. The woman then told respondent that appellant ill-treated her, and that she would have nothing more to do with him. Appellant alleges that respondent has handed the woman over to one Mangate to be ukungenaed by him. In the Native Commissioner's Court he applied for an order prohibiting the respondent from doing so. Appellant claims to be the general heir of respondent and as such entitled to object to any illegal action taken by his father (respondent).

His contention that the woman and Mangete are cohabiting has not been proved.

The question of the status of a woman who has entered into an ukungena union is raised.

Ukungena is not a marriage, and such a union is not as binding as a marriage. It is entered into for an express purpose, viz.: to provide an heir or to increase the estate of the deceased husband. The intervention of the Court is not essential to its dissolution. The woman may, with consent, break off the union and marry anyone who pays *lobolo* for her.

The unreasonable withholding of such consent could form the subject-matter of complaint to the Native Commissioner.

The appellant is not the kraalhead, and had no right to bring the application.

The appeal is dismissed with costs, and the judgment of the Native Commissioner upheld.

1930. *June* 18. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Return of lobolo.—*Prescription of claim.*—*Section* 182 *of the Schedule to Law* 19 *of* 1891.—*Section* 1, *Act* 13 *of* 1894.—*Section* 2, *Act* 7 *of* 1910.—*Proclamation No.* 9 *of February*, 1910.

FACTS: An appeal from the decision of the Native Commissioner at Ndwedwe.

Where the Chief gave judgment for plaintiff in his Court for the return of five head of cattle and costs which cattle were alleged to be due as *lobolo* on the defendant's late mother who married defendant's late father about the year 1893. On appeal to the Native Commissioner's Court the Chief's judgment was upheld with costs; and where the case resolved itself into one whether it was competent for the Native Commissioner to have heard it.

HELD: That the Native Commissioner as well as the Chief erred in entertaining the action which was clearly barred by statute under sec. 182 of Schedule to Law 19 of 1891, sec. 1 of Act 13 of 1894, sec. 2 of Act 7 of 1910 and Proclamation No. 9 of February, 1910.

The appeal was allowed with costs.

For Appellant: Mr. *D. L. Forbes*; for Respondent: In person.

BRAATVEDT, Member of Court, delivered the judgment of the Court: This case resolves itself into one whether the Native Commissioner was competent to hear it?

He finds as a fact that the cause of action, which is one of *lobolo*, arose during the period 1891 to 1895.

Sec. 182 of the Code lays down that subsequent to the 31st day of December, 1893, no action may be instituted in any Court for the recovery of *lobolo* or inheritance arising out of *lobolo* claims, in connection with any marriage entered into before the date of the promulgation of this Code; and no action may be instituted at any time or before any Court for the recovery of *lobolo* in respect of marriages entered into after the promulgation of this Code.

This provision was modified by sec. 1 of Act No. 13, 1894, which empowered the Supreme Chief in Council to authorise, in cases where circumstances appeared to warrant that course, and

notwithstanding the provisions of sec. 182 of the Code, the institution of actions for the recovery of *lobolo* or inheritance arising out of a *lobolo* claim in connection with a marriage entered into before the date of promulgation of the Code, provided that no such authority shall be given after the 31st day of December, 1894.

Sec. 2 of Act No. 7, 1910, enacts that at any time when, owing to prohibition of the movement of cattle or for other reasons, difficulty is experienced by Natives in delivering *lobolo*, the Supreme Chief may by proclamation suspend the operation of sec. 182 of the Code either generally or in part or parts of the Colony specially affected. Such suspension shall apply to claims arising in connection with marriages taking place on or after a date to be mentioned in the proclamation.

Proclamation No. 9 of 1910 of the 3rd February, 1910, fixes the date of such suspension as the 3rd May of November, 1909.

From the enactments cited it is quite obvious that the plaintiff was out of Court and the Native Commissioner as well as the Chief erred in entertaining the action which is clearly barred by Statute.

The appeal must succeed with costs.

NYAKANA LUTULI v. MLAMULA NGCOBO

1930. *June* 19.—Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Registration of Chief's judgment.—Interpretation Rules 6-13 *framed under section* 71 *of Act* 49 *of* 1898.

Facts: An appeal from the decision of the Native Commissioner at Mapumulo.

Where respondent a Native Chief in July, 1928, gave judgment in favour of the plaintiff in a case which was only registered at the magistrate's court in September, 1929. In August, 1929, respondent attached a certain cow because defendant had failed to satisfy the judgment. Appellant a brother of defendant before the Chief brought an action before the Native Commissioner's Court claiming that the cow was his and had been wrongly attached. Judgment was entered in favour of defendant (respon-

dent). And where on appeal to this Court it was argued by counsel for appellant that as respondent's judgment was not registered within the time prescribed by the rules then in existence, namely, 30 days, it automatically had become null and void and could not have been enforced against the appellant. It was admitted that there was such a judgment and that it had not been satisfied.

HELD: That the non-reporting of a judgment within the time prescribed did not nullify the judgment itself which could nevertheless be enforced by the Chief himself through his own messenger. Reporting was not essential to the validity of a judgment.

HELD, further: That Rules 6 and 13 which were framed under sec. 71, Act 49 of 1898 do not mention registration but only make it imperative that judgment should be reported and therefore a time limit was fixed. The Court was of opinion that the main purpose of Rules 6 and 13 was twofold: (1) To enable the judgment creditor to invoke the aid of the clerk of court in issuing a writ of execution where the Chief's messenger had failed or where it was apprehended that he was likely to fail. (2) To ensure that judgments against Natives residing on private lands could be enforced without the risk of friction between the landlord and the Chief.

The appeal was dismissed with costs.

For Appellant: Mr. *Downing*; for Respondent: Mr. *W. T. Clark*.

BRAATVEDT, Member of Court, delivered the judgment of the Court: Respondent is a Native Chief residing in Mapumulo District.

On the 3rd July, 1928, he gave judgment in a case between one Mlunjelwa and one Tunwane.

The judgment was registered at the magistrate's court on the 17th September, 1929.

In August, 1929, the respondent attached a certain cow because the defendant (Tunwane) had failed to satisfy the judgment. The attachment was made before the case had been registered.

The appellant who is the brother of Tunwane, and who resides in the same kraal, then brought an action against respondent claiming that the cow was his and that it had been wrongly attached. The Native Commissioner gave judgment in favour of the defendant (present respondent) with costs.

Although the Chief's judgment was not registered until 14 months after it had been given it is not disputed that there was such a judgment. Tunwane himself admits it, and also admits that it has not been satisfied.

The appellant failed to prove that the beast was his property. The evidence discloses that both Tunwane and appellant's mother had laid claim to it. Respondent stated in the court below that he would be prepared to release the beast if the judgment debt and costs due by Tunwane had been paid.

In the first place the appellant has failed to prove that he was the rightful plaintiff in the case. He may of course be the owner of the beast, and it should be possible, by calling further evidence, to clear up the point. If he is the owner the beast should be returned to him as he was not the defendant in the Chief's Court.

It is argued by counsel for appellant that as the Chief's judgment was not registered within the time prescribed by the rules then in existence, it automatically became null and void and could not be enforced against the defendant in his Court. In other words that there has been no judgment by the Chief.

The present rules for Chiefs' Courts, which are framed under the Native Administration Act of 1927 came into force on the 1st January, 1929. There is no provision for registration of Chiefs' judgments under the present rules, and the argument put forward would be valueless in the case of any judgment given by a Chief since the 1st January, 1929. The judgment in this case, however, was given in July, 1928. At that time the old rules were in force, and the point in question must be decided on those rules. Rule 13 of those rules reads: "Chiefs . . . . shall report all cases tried by them including cases of disobedience of their orders, or contempt of their persons or Courts; such reports to be made within thirty days of judgment being pronounced."

Rule 6 provides that messengers, on being instructed by Chiefs, shall carry out their judgments, but goes on to say that whenever a Chief's judgment has to be put in force against a Native residing on private property, the Chief shall apply to the clerk of the magistrate's court for a writ of execution, but that the clerk is prohibited from issuing a writ for enforcing any unrecorded judgment of a Chief.

It is contended that the two rules referred to must be interpreted to mean that unless the judgment is reported to the magistrate within thirty days it, *ipso facto*, becomes null and void.

It may here be noted that the rules do not mention registration but only make it imperative that judgments should be reported.

It is at least debatable whether sec. 71 of Act 49, 1898, under which the rules were framed, conferred the wide power which counsel for the appellant asks us to read into it.

It seems to us that the main purpose of the rules was twofold, viz.: —

(1) To enable the judgment creditor to invoke the aid of the clerk of court in issuing a writ of execution where the Chief's messenger had failed or where it was apprehended that he was likely to fail.

(2) To ensure that judgments against Natives residing on private lands could be enforced without the risk of friction between the landlord and the Chief.

Naturally a messenger sent from the magistrate's court would appear to be clothed with more authority than a Chief's messenger and there would be less likelihood of resistance to his execution than to an execution by a Chief's messenger.

For these reasons, probably, the rules were framed, but in order to ensure that there should be a record of all cases heard by Chiefs and that there should be accuracy as to detail a time limit for making the report was fixed. The Chiefs would appreciate the advantage of being able to secure the Court's assistance where there would be a likelihood of resistance to attachment, and would be encouraged to register their judgments as soon as possible so as to ensure that such assistance might be invoked.

It would indeed be placing a great strain on Rule 13 if it were interpreted to mean that failure to report involved nullification of the judgment of a Court of competent jurisdiction.

There is nothing in the Act or in the rules which would justify such a contention.

We must therefore hold that the non-reporting of a judgment within the time prescribed did not nullify the judgment itself which could nevertheless be enforced by the Chief himself through his own messenger.

If the reporting were essential to the validity of a judgment then quite obviously there could be no execution by the Chief prior to such event. The logic of this counsel for appellant admits and he does not oppose the view that execution may issue at any time within the thirty days.

The attachment in the case before the Court was a valid one, and the only question for decision on the merits is whether it was defendant's property which was attached?

The appeal is dismissed with costs.

The case is referred back to the Native Commissioner with instructions that he shall call further evidence in order to clearly establish the ownership of the beast in question; the evidence which has already been taken to form part of the record. If it is proved that the beast belongs to the appellant the Native Commissioner is required to make an order for its return to him.

MKULUNYELWA ZIKALALA v. MZAMO ZIKALALA.

1930. *June* 23. Before STUBBS, President, AHRENS and BRAATVEDT, Members of the Court.

Legality of disposition of kraal property.—Allocation to a junior son.—Sections 68, 97 *and* 140 *of the Code of* 1891.—*Kraalhead absolute owner.*

FACTS: An appeal from the decision of the Native Commissioner at Ladysmith.

Where appellant as general heir in his late father's estate sued respondent for the return of certain property. The Record disclosed that the father made a disposition of his property two days before his death in the presence of appellant, respondent, a friend and other members of the family in that appellant should receive five head of cattle, ten goats and £10. Appellant's allegation that the disposition was cancelled the following day was uncorroborated; and where appellant's counsel raised the questions whether there was allocation in accordance with Native law and if so, whether it was legal, under secs. 68, 97 and 140 of the Code of 1891.

HELD: That sec. 97 of the Code refers to a written testament or will. Sec. 69 states that the kraalhead is absolute owner of all kraal property and as such he may dispose of it as he pleases during his lifetime. Dispositions made by the kraalhead on his death bed must be considered as binding for he was the undisputed sole owner until he died.

Held, further: That a written document purporting to contain dispositions of his movable property which were not announced by him in his lifetime cannot be entertained as Native law and custom demand that the wishes of a kraalhead should be made public by him.

The appeal was dismissed with costs as the appellant had received that portion of the estate apportioned to him.

For Appellant: Mr. *Johnson;* for Respondent: Mr. *Macaulay.*

Stubbs, P., delivered the judgment of the Court: The parties are sons of the late Mangnotshwa by different mothers. Appellant is the general heir.

The appellant was the plaintiff in the court below. He sued, in his capacity as general heir, for certain cattle, horses, sheep, goats, money, etc., in the estate. The defendant (present respondent) tendered five head of cattle, ten goats and £10 in cash. The Native Commissioner entered judgment in favour of the plaintiff in terms of the tender. Appellant now appeals against such judgment.

The evidence discloses that the late Mangnotshwa made a disposition of his property two days before his death. He gave the appellant five head of cattle, ten goats and £10. Appellant and respondent were both present, and appellant admits that this is correct. Other members of the family, and at least one neighbour (Mneli Nkosi) were also present. There is, therefore, no doubt whatever as to the disposition made by Manguotshwa on that occasion. Appellant alleges that he called again on Manguotshwa on the following day, and that he then cancelled the disposition, and gave the estate to him (appellant). In this statement he is entirely uncorroborated. The Court accepts as an established fact that the disposition of property already mentioned was the only one made by the late Manguotshwa.

Respondent admits he received eight head of cattle, twenty goats, ten sheep, two ploughs, a planter, a harrow and four horses. He received more than appellant who is the general heir.

Although the evidence is not clear on the point, it appears that the property which was given to both parties was kraal property, and not house property. At anyrate there is nothing in the evidence to indicate otherwise. It may here be stated that appellant failed to prove that the estate was of the value claimed by him.

Appellant had lived apart from his father for many years prior to the death of the latter, and had not supported him during that time. Respondent on the other hand lived with his father and assisted him in every possible way, *e.g.*, by paying dipping fees for his stock and by discharging all liabilities to the landlord. Respondent had been a dutiful son, while appellant had been unfilial and indifferent to his aged father's well being.

For these reasons Manguotshwa apportioned more of the estate to respondent than to appellant.

Mr. *Johnson* for appellant raised three questions, viz.:

(1) Was there allocation?

(2) If so, was it carried out in accordance with Native custom?

(3) If so, was it legal?

The reply to the first question is that there was undoubtedly allocation. Both parties admit it.

The second question must also be answered in the affirmative. Both parties were present; the other members of the family were also present, and a neighbouring kraalhead heard what was said. There is, therefore, no question as to the disposition made by the kraalhead, and the Court finds that there was sufficient compliance with Native custom in that regard.

The third question remains for consideration. Can a kraalhead on his deathbed make gifts of kraal property to junior sons to the prejudice of the general heir?

Appellant's counsel has quoted secs. 8, 97 and 140 of the Code of 1891.

Sec. 68 reads: "The kraalhead is absolute owner of all property belonging to his kraal, which does not specifically belong to any individual house in his kraal, or to any inmate therein, who is not of the family of the kraalhead," etc.

Sec. 97 reads: "Testamentary succession is unknown, and no Native may under Native law make a will except under Law 12, 1864." Law 12 of 1864 was repealed by Act 7 of 1895 which in turn has been repealed by Act 38 of 1927.

Sec. 140 of the Code deals with the disinherison of sons who refuse to be controlled by the kraalhead, etc.

In the case before the Court there was no disinherison. Appellant remains the general heir and all rights inherent in a general heir remain in him, *e.g.*, he is entitled to any property that may accrue to the kraal after his father's death which includes debts due to the estate.

Can the disposition which was made in this case be regarded as falling within the scope and meaning of sec. 97 of the Code?

The section, in our opinion, refers to a written testament or will. Sec. 68 states that the kraalhead is absolute owner of all kraal property. As such he may dispose of kraal property as he pleased during his lifetime. Sec. 137 of the Code reads: "Assistance rendered by a kraalhead to any of his sons from kraal property, in obtaining for him a wife, ... is a gift and creates no debt to the Indhlunkulu house," etc. This only emphasises the fact that the kraalhead is absolute owner of the general kraal property and that he can dispose of it as he pleases. If, when he dies, there is kraal property in the estate the general heir naturally succeeds to it. Dispositions made by the kraalhead on his deathbed must be considered as binding, for he is the undisputed sole owner until he dies.

A written will or testament is undoubtedly what is referred to in sec. 97. Natives, prior to the advent of the Europeans, were uniformly illiterate and naturally written wills were unknown to them, sec. 97 simply confirms the *status quo* in that respect: Native law and custom demand that the wishes of a kraalhead should be made public by him, and a written document purporting to contain dispositions of his movable property which were not announced by him in his lifetime cannot be entertained.

As the kraalhead is absolute owner of the kraal property, and as we hold that he may dispose of such property as he pleases during his lifetime the answer to the third question, namely, "Was the disposition in this case legal?" must be in the affirmative.

The appellant has received so much of the estate as was apportioned to him by his late father and the appeal must therefore be dismissed, and the judgment of the trial Court confirmed with costs.

1930. *June* 23. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Native customary law.—Rival claims of a surviving male twin to deceased twin brother's property, the eldest brother of the "House".—Custom and law of primogeniture.

FACTS: An appeal from the decision of the Native Commissioner at Estcourt.

Respondent was a kraalhead and general heir to his father's estate. Appellant was a younger brother of respondent and the surviving male twin who claimed from respondent his twin brother's property as they were one person, being twins. It was established in evidence that similar instances of twin succession of the description in point occurred in the Estcourt district and that it was a general custom among the Zulu commonalty of that district.

The point at issue was whether this custom regarding the property of twins was a valid one and whether it could nullify or qualify the ancient custom of primogeniture. The custom referred to had prevailed in the district of Estcourt for almost sixty years.

HELD: That a law which had its genesis in the ancient polity of the founders of the race and had been universally recognised and generally applied down through the ages to the present time and received sanction and reaffirmation in the Code of Native law, secs. 101, 106 and 115 cannot be ousted by a modern development within a tribal entity in a given area and therefore the law of primogeniture must prevail.

HELD, *further*: That as there was neither a legal disposition by respondent in favour of appellant so as to vest the property in appellant nor an acquiescence as to estop respondent from making the claim, the appeal must be dismissed with costs.

For Appellant: Mr. *D. G. Shepstone*; for Respondent: No appearance.

STUBBS, P.: May I at once say this case raises novel and intriguing points of law: the rival claims of a surviving male twin to his deceased twin brother's property and the eldest brother of the "house". I am much impressed with the manner in which the

evidence was recorded and the conduct of the proceedings as a whole in the court below. The evidence is clear, concise and to the point and the Native Commissioner in his reasons for judgment has furnished a lucid exposition of the customary law in respect of the claim to the property of a twin predeceasing his twin brother (now the claimant) in its relation to and bearing upon the custom of primogeniture with its pristine association and implication. This is a classical example, which might well be emulated, of a studied presentment of facts and reasons in elucidation of a distinctly complicated issue rendering its solution by this Court far less difficult than might otherwise have been the case.

The Native Commissioner in discussing the issue cogently observes: "The question at issue therefore was whether this custom regarding the property of twins was a valid one and whether it could nullify or qualify the ancient custom of primogeniture. Chapters 25 and 38 of the book of Genesis deal with notable twins in the time of Moses but do not give them the right to succeed to each other but only give seniority to the first-born twin. In no law can I find any authority that gives a twin the right to succeed to the property of his deceased twin brother of such twins. Is the alleged custom referred to in paragraph 8 one that can be regarded as a well-established custom having the authority of law? Van der Linden on *Custom* says: 1. It must be based upon sound reason; 2. It must be satisfactorily proved (*a*) by a great number of witnesses, (*b*) by an unbroken chain of decisions based upon the custom, (*c*) by long usage. Holland in his *Elements of Jurisprudence* says of custom, as a source of law: 'Its characteristic is that it is a long and generally observed course of conduct . . . . .' Does the custom relied on by defendant comply with any of these requirements? It does not; and moreover as the effect of accepting it as a valid custom would be to qualify or abrogate succession by the law of primogeniture it cannot be accepted as it only originated within the last 50 or 60 years while the law of primogeniture has been observed by the natives from time immemorial. Great stress has been laid by the defendant in what he calls plaintiff's acquiescence in the custom, but as most of plaintiff's are those that an elder brother does for a younger who is not one of twins, no weight should be given to these actions of plaintiff, e.g., the giving of the girl to the surviving brother of her intended husband is frequently done to my

knowledge where no question of twins arises and the giving of the cattle by an elder brother for a younger frequently occurs. The present acknowledged custom of rearing twins in separate kraals seems to me to negative the fiction of one entity for the two persons."

This view is challenged on a variety of grounds the essential one of which is that the weight of evidence establishes that the custom of one twin succeeding to the property of another twin on the death of the latter without issue to the exclusion of the eldest brother (General Heir) has prevailed for 50 or 60 years amongst the Natives of the district of Estcourt, isolated instances of which are given, has the force of law and in so far at anyrate as that district is concerned qualifies or abrogates the succession by the law of primogeniture which from time immemorial has been of universal application. There can of course be no doubt that a number of witnesses of standing notably the Chief Peni Mabaso and Induna Mpukane Mbata have been called to prove that similar instances of twin succession of the description in point have occurred in the Estcourt district but it would indeed be a dangerous doctrine to hold that because such is the modern development within a tribal entity in a given area, a law which has its genesis in the ancient polity of the founders of the race and has been universally recognised and generally applied down through the ages to present times, a law which is embodied and receives its further sanction and reaffirmation in the Code of Native Law, secs. 101, 106 and 115, is ousted thereby. To me the argument against such a proposition is irresistible and I have no hesitation in saying that the Native Commissioner, no matter what contemporary authorities have held to the contrary—it is said in evidence that a brother magistrate, Mr. Bennett has decided otherwise—in my view has on the question of law come to a correct decision.

The contention that the succession of a twin to the property of a deceased twin in circumstances which amount to a negation of the fundamental rule of primogeniture does not, apart from any other considerations, seem to be borne out by historical fact because among certain leading tribes the custom has always been to kill the twins soon after birth. Among the Bavenda in the Zoutpansburg with whom I was associated for seventeen years cases of twin murder were and are continually before the Courts.

The birth of twins is regarded as a defilement of the house, it signifies a death and *Junod*, speaking of the Thonga says: "Hence the purifactory rites which bear the character of passage rites: the mother is secluded and passes through a period of isolation after which she is again admitted to society after a painful casting away of her misfortune. Twins are not liked by the people. They are considered as bad characters. When the little ones begin to crawl and chance to go towards the other huts, people throw cinders at them and drive them away." Even where, as is rare, they are allowed to live, their place and status in the family organism are of an inferior order. This may or may not be so among the Zulu; we, however, have it on record that among them twins during the rule of the Zulu kings were put to death. *Bryant* says, however, that the last born was put to death. Even now very little care is bestowed on the weaker of the two which rarely survives the meagre treatment meted out to it.

It is the recognised rule among the commonalty in certain tribes that a surviving twin with or without issue has no heritable rights from his deceased twin brother as against an elder brother, but with the consent of those concerned he may ngena the brother's widow and raise seed to that house and should there be male issue of the ngena union and the issue were to die without issue any accrued property would pass to the paternal uncle. In other words the twin's eldest brother, in this case the respondent.

I have drawn an outline of the disabilities of twins in the general make up of Native family life to emphasise that the comparatively modern innovation among a section of the Zulu in the district of Estcourt by which it is sought to override a custom which goes to the root of succession and inheritance is one which should be closely scrutinised and weighed before accepting it as having definitely a place in the customary jurisprudence of these people. I think I have said sufficient to show that whether the case be that of twins or individuals more fortunately circumstanced in Native life it does not lie with this Court to allow these attempts at impingement upon institutions of law entrenched, sacrosanct.

Moreover, the Native Commissioner who tried the case must be presumed to have knowledge of the law and he has said in definite terms what his knowledge and experience is and I have no reason to believe that his views do not correctly reflect the position.

Mr. *Shepstone* has argued that the deceased twin has his being and lives in the personality of the living twin. That the ceremonies observed after the death of the one connote preservation of the entity of the deceased twin in that of the survivor and that as there has been no change, they twain being one, the property rights simply remain in the survivor—the appellant, and he cannot be divested of them by the general heir, He argues: Even if this be a fiction that as the kraal head is absolute owner of kraal property he could make and did in fact make a disposition of the deceased twin's property to appellant and if he did not make such disposition he at least acquiesced in the passing of the property to appellant and cannot now be heard to maintain the claim for the recovery of this property.

I think these points may be simply dismissed on the evidence which has been adduced to establish that the identity is not one but separate and distinct as has been shown and that there was neither a legal disposition by respondent in favour of appellant so as to vest the property in appellant, nor was there such acquiescence as to estop respondent from making the claim.

Having said this it is not necessary that I should refer to the other aspects of the matter which are no more than ancillary to the main question.

The appeal is dismissed with costs.

AHRENS, Member of Court: I concur.

BRAATVEDT, Member of Court: I concur with the judgment delivered by the learned President. Mr. *Shepstone* in his argument raised a point which is not reflected in the grounds of appeal, namely, that the evidence disclosed that there were only nine goats in the estate and not eighteen. On reading the Record I find that respondent in whose kraal the deceased's twin's property was kept stated that there were eighteen goats. Appellant's witness Tshutshu also mentioned eighteen goats. Appellant stated that there were only nine goats, but there is no corroboration of his evidence. The evidence, therefore, clearly shows that there were eighteen goats, and Mr. *Shepstone's* argument falls to the ground.

1930. *June* 24. Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Contract with medical man.—Use of spells.—Sections 268, 269 *and* 270 *of Code of* 1891.—*Section* 9 *Zululand Proclamation No. VII of* 1895.—*Costs.*

Facts: An appeal from the decision of the Native Commissioner at Verulam, Inanda District.

Appellant engaged respondent who is a licensed medical man to proceed from Durban to Empangeni to doctor his sick brother. It was agreed that respondent should receive £3 15s. which amount included the ulugxa fee. Respondent failed to fulfil the contract and meanwhile the brother of appellant died. On respondent's suggestion to appellant it was further agreed that respondent should "doctor" the kraal against all evil, for which act he received a beast. Shortly afterwards appellant lost a number of cattle.

Held: That respondent committed offence under secs. 268, 269 and 270 of the Code of 1891 and under sec. 9 of Zululand Proclamation No. 7 of 1895, when he doctored the kraal, but as appellant was a party to the crime he was not entitled to recover the beast paid.

Held, further: that as the amount of £3 15s. was paid against a definite arrangement and respondent failed to carry out the contract, appellant was entitled to recover this amount.

The appeal was sustained and the Native Commissioner's judgment altered to one in favour of plaintiff for £3 15s. Costs in both Courts had to be paid by respondent.

For Appellant: Mr. *W. T. Clark*; for Respondent: Mr. *D. L. Forbes.*

Braatvedt, Member of Court, delivered the judgment of the Court: The appellant was plaintiff in the court below, and claimed from respondent £3 15s. in cash and one head of cattle or its value £5.

The Native Commissioner gave judgment for the defendant with costs.

The appellant engaged respondent, who is a licensed Native medical man, to proceed from Durban to Empangeni to doctor his (appellant's) sick brother. He paid respondent £3 15s. which amount included the ulugxa fee and train fare to Empangeni. It

was agreed that both parties should proceed to Empangeni together on a fixed day. On the day in question appellant travelled to Empangeni, but the respondent failed to put in an appearance. About two weeks later the appellant found the respondent in someone else's kraal in Empangeni district. Appellant's brother had died in the meanwhile. He had, unbeknown to the parties, died before the appellant reached his kraal.

Respondent then suggested to appellant that he would fortify the latter's kraal against all evil on payment of a beast. To this suggestion the appellant agreed. Respondent dug holes in the kraal, filled them up with stones and poured water over the stones. He was paid a beast for his services and then left. Shortly afterwards the appellant lost a great number of his cattle from disease.

The respondent committed a criminal offence when he " doctored " the kraal for secs. 268, 269 and 270 of the Code of 1891 and sec. 9 of Zululand Proclamation No. VII of 1895 prohibit the use of spells and charms and make it a criminal offence to do these things. The appellant, however, was a party to the crime, and therefore cannot recover the beast which he paid.

He is, however, entitled to recover the £3 15s. cash payment, as it was definitely agreed between appellant and respondent that the latter should travel to Empangeni on a certain date. This he failed to do.

The appeal is sustained and the Native Commissioner's judgment altered to one in favour of the plaintiff in his Court (present appellant) for £3 15s.

Costs in both Courts to be paid by respondent.

MBULAWA MAPUMULO v. NOZAKA MAPUMULO.

1930. *June* 24. Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Dispute concerning the administration of Native estates.—Enquiry in terms of section 3 (3) *of Government Notice No.* 1664 *of* 1929.—*Heirs to* indhlunkulu *and* ikohlo *huts.—Legitimacy.—Sections* 68, 78, 94, 95 *and* 226 *of the Schedule to Law* 19 *of* 1891.

Facts: An appeal from the decision of the Native Commissioner at Pinetown.

Where appellant was the son of the senior House and respondent was the junior wife of appellant's father, and where respondent repudiated the claim of appellant to exercise his rights over her hut in that the illegitimate son of her daughter who was about to be married to the son's father was the general heir to the ikohlo hut; and where the Native Commissioner at an enquiry in terms of sec. 3 (3) of the Regulations framed under sub-sec. 10, sec. 23 of Act 38 of 1927 and published by Government Notice No. 1664 of 1929, held that the illegitimate child born to the daughter of the junior wife of appellant's father was the heir of the ikohlo hut and ordered that the widow of appellant's father have the use of the property of the ikohlo hut and should hold such property in trust for the heir.

This decision was brought in appeal on the grounds:—

(1) That in Native law the woman had no legal status to sue unassisted.

Held: That in terms of sec. 226 of the Code no civil action can be brought by or against a female (unless she is a kraalhead) except in the name of and duly assisted by her guardian as females are always considered minors in terms of sec. 94 of the Code unless emancipated as provided by sec. 78 of the Code.

(2) That the boy was illegitimate and that his mother was about to be married to his father.

Held: That as it was established that the boy was illegitimate and that his mother was about to be married to his father, in terms of sec. 95 of the Code he was not the heir to the Ikohlo House.

(3) That appellant as general heir to his father's estate was entitled to the whole estate.

Held: That as heir to the indhlunkulu house appellant in terms of sec. 68 of the Code was heir to the whole estate.

The appeal was sustained with costs.

For Appellant: Mr. *D. L. Forbes;* for Respondent: No Appearance.

Stubbs, P.: This is an appeal against the finding of the Native Commissioner, Pinetown, at an enquiry held by him in terms of sec. 3 (3) of the regulations framed under sub-sec. 10, sec. 23 of Act 38 of 1927, published under Government Notice No. 1664 of 20th September, 1929.

He found as follows:—

"That the child Fanyana Mapumulo is the heir of the ikohlo hut and as such heir of the cattle belonging to that hut—at present thirteen head of cattle. In the circumstances disclosed in Court it is ordered that Nozako, widow of Mbopa, have the use of these cattle and any kraal property, holding same in trust for the heir of her hut, viz.: Fanyana Mapumulo."

Mbulawa now appeals to this Court on the following grounds:—

"1. That the judgment was against Native law and custom in that a woman has no legal status to sue unassisted.

"2. That the boy Fanyana is illegitimate and is not a son of Mbopa's daughter who is about to be married to the boy's father.

"3. That appellant is the heir of Mbopa and is entitled to his whole estate, and even if there were a minor boy who might be entitled to the estate, the estate of Mbopa would still come under the care of appellant as the general heir."

As regards ground 1 of the appeal it is quite clear that no civil action can be brought by or against a female (unless she be a kraalhead) except in the name of and as duly assisted by her guardian (*vide* sec. 226 of the Code).

Females are always considered minors and without independant power, except as provided for in sec. 78 of the Code (see sec. 94 of Code).

There is nothing on record to show that respondent has been emancipated in terms of the provisions of sec. 78 of the Code.

Respondent is a junior wife of the late Mbopa.

Dealing with ground 2 of the appeal, it has been accepted as a fact that Fanyana is the illegitimate son of Mbopa's unmarried daughter.

The Native Commissioner seems to have overlooked the provisions of sec. 95 of the Code, which reads as follows:—

"Every child born of an unmarried native woman becomes a member of the house of the mother of such unmarried native woman, and is subject to the head of the kraal. In the event of the father of any such child marrying the mother thereof, the child changes its position and becomes a member of the house established by such marriage."

Fanana, the moment his mother marries his father, will change his position, and, if the finding of the Native Commissioner were

correct he would be entitled to take the inheritance with him as his absolute property.

His legitimisation occasioned by the marriage of his parents would be at the expense of the indhlunkulu house through the ikohlo house, because, had he been born in wedlock he would have no claim to this particular inheritance. This would mean placing a premium on illegitimacy.

On the third ground of appeal, the appellant is the heir of Mbopa. He is now kraalhead. Sec. 68 of the Code makes the following provision:—

> "The kraalhead (when not merely guardian) is absolute owner of all property belonging to his kraal, which does not specifically belong to any individual house in his kraal or to any inmate therein, who is not of the family of the kraalhead As regards property belonging to houses of his family, he has the charge, custody, or control thereof, and he may in his discretion, use the same for his own personal wants and necessities, or for any general kraal purpose, or the entertainment of visitors, or he may use, exchange, loan, or otherwise alienate the same for the benefit, or in the interests of, the house to which it belongs: but he may not use or deal with the house property, for the benefit or on behalf of any other house in the kraal, without creating an obligation on the part of such other house, to return the property so alienated or its equivalent in value. There is a duty upon the kraalhead, to keep distinct the estates belonging to the various houses in his kraal, and to settle all disputes regarding the same."—See *Mkulungelwa Zikalala* v. *Mzamo Zikalala* (N.A.C. June, 1930).

Sec. 77 provides the remedy in cases where a kraalhead or guardian charged with the custody of persons or of kraal or house property acts foolishly or prodigally therewith.

In view of what has been said the Native Commissioner had no authority to order that Nozako, widow of Mbopa, is to have the use of the cattle in question as well as any kraal property, to hold same in trust for Fanyana, and he erred in his finding that the child Fanyana Mapumulo is the heir of the Ikohlo hut and as such entitled to the cattle belonging to such hut.

The appeal is sustained with costs.

Ahrens and Braatvidt concurred.

1930. *June* 24. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Native law.—Seduction.—Claim for return of lobolo.—*Costs.*

FACTS: An appeal from the decision of the Native Commissioner at Pinetown.

Where appellant sued respondent before the Chief for six head of cattle being refund of cattle having been paid to respondent in respect of *lobolo* for the latter's daughter who was engaged to appellant but subsequently jilted him, and where appellant having been awarded two head of cattle by the Chief appealed to the Native Commissioner who upheld the Chief's judgment against which decision appeal was brought; and where it was argued that the practice of *ukuhlobonga* amounted to seduction and therefore the appellant was not entitled to more than that which was already awarded to him in the Chief's Court.

HELD: That as the evidence did not establish that appellant seduced the girl but only that *ukuhlobonga* had been indulged in and that as it was established that the girl jilted appellant before marriage, the appeal must be sustained with costs and judgment entered for appellant for the return of the full *lobolo* paid to respondent.

For Appellant: Mr. *Thompson*; for Respondent: Mr. *Fowle*.

AHRENS, Member of Court, delivered the judgment of the Court:

The appellant in this matter, according to the summons dated 8th June, 1929, sued the respondent before Chief Lokotwayo for six head of cattle, being refund of cattle which he alleges he paid respondent in respect of *lobolo* for the latter's daughter Sarah Mbhokazi who was engaged to appellant but subsequently jilted him. Particulars of such cattle are given as follows: "Two (2) horned cattle and four (4) head in cash (£16)."

The Chief is stated in the summons to have given judgment for appellant for three head of cattle and costs.

The appellant, being dissatisfied with the judgment of the Chief, appealed to the Native Commissioner, Pinetown, and the Assistant Native Commissioner dismissed the appeal with costs, and the appellant has now come to this Court.

The Native Commissioner in his reasons, was satisfied from the

evidence that two horned cattle and £6 equalling three head of cattle, as also £10 were paid by the appellant to the respondent.

He finds that the two horned cattle and £6 equalling three head of cattle altogether, were in respect of *lobolo*, but the £10, over and above, was paid by the appellant to the respondent as an "extra". He does not tell us what the "extra" represents or means. He therefore finds, in effect, that the appellant paid the respondent two head of cattle plus £16 in cash. This agrees with the evidence of the appellant.

In paragraph 3 of his "Facts found proved", the Native Commissioner states that the appellant admits that the two head which he alleges he bought from respondent for £6 were never paid over as *lobolo*, on account of respondent's daughter jilting him, but the appellant explains this in his evidence in cross-examination by Mr. *Fowle* when he says: "I have not included the two head which I bought from him (respondent) as he already had them in possession . . . . I ascertained the red and white cow with its black heifer had been resold by the respondent and was no longer at his kraal. I then said I claimed the money with which I bought these two head. I paid £6 for the two."

As already stated, the Native Commissioner has found that two head of cattle plus £16 in cash were paid to respondent by appellant.

There is nothing on the Record before us to justify the Native Commissioner in finding that the appellant had seduced respondent's daughter, Sarah. Sarah states in her evidence that the appellant used to have external connection with her and this appellant does not deny. This is after all no more than the recognised practice of *ukuhlobonga*, and it hardly ever occurs that pregnancy results from such intercourse. The very reason of appellant sending her to a European doctor to be examined suggests that as far as he, appellant, is concerned, nothing more than external intercourse had been indulged in. When she went to the European doctor to be examined she had been pregnant for two months, according to her own showing, although she told him about her condition, yet she could not tell what was wrong with her. She also states that she had an abortion during her fourth month and yet he tells her father, so he says, that such abortion took place in her seventh month. She had a lover prior to appellant whom she jilted, and whilst she was still engaged to appellant, she received a love letter from Mahamed, who was then courting her.

In view of what has been said her evidence is tainted to such an extent that it has become valueless.

In the circumstances we do not agree with the finding of the Native Commissioner and the appeal will be sustained with costs and judgment entered for appellant for two head of cattle or their value £9, plus sixteen pounds (£16) sterling.

SITABATABA BUTELEZI v. SHADRACK BUTELEZI.

1930. *June* 26. Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Absence of rules of procedure.—Rules 8 (1), 9, *and* 16 (1).—*Application for extension of time within which to note an appeal.—Absence of notice on respondent.—Irregularity.*

Facts: In the matter of an application for an extension of time for leave to appeal from the decision of the Native Commissioner at Ladysmith.

Where application for an extension of time within which to note an appeal was made by the applicant without communicating any notice to the respondent and where the rules governing procedure in the Native Appeal Court are silent as to the method of procedure in application cases.

Held: That it was desirable in the matter of applications for extension of time that the opposite party should receive proper notice thereof as it is conceivable that he may desire to object on good grounds.

Held, further, That although the rules are silent as to procedure in the matter of applications it is proper to follow as nearly as possible Rules 8 (1), 9 and 16 (1) of the Native Appeal Court Rules to ensure notice of set down.

The application was refused but it was left open to applicant to comply with the rules and have the application heard at a later date.

For Applicant: Mr. *Downing*; for Respondent: Mr. *Clemens*.

Stubbs, P.: This is an application for extension of time by Sitabataba Butelezi in which to appeal against the judgment of

the Assistant Native Commissioner for the district of Klip River delivered on the 20th May, 1930, in the above matter.

Mr. Johnson has admitted that notice of this application has not been communicated to the respondent. It is undoubtedly desirable in applications of this nature that the opposite party should receive proper notice thereof as it is conceivable that he may desire to object and have good grounds for such objection, but would have no opportunity of preferring such, unless there has been notice to him of set-down. In these matters, although the rules are silent as to procedure, it is proper that we should follow as nearly as possible Rules 8 (1), 9 and 16 (1) of the Native Appeal Court rules to ensure notice of set-down. That being so, the application is refused at this stage, but it is open to applicant to comply with the rules and have his application heard during the present session of this Court, if he so desires.

AHRENS, Member of Court: I concur.

BRAATVEDT, Member of Court: I concur.

SITABATABA BUTELEZI v. SHADRACK BUTELEZI.

1930. *June* 26. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Extension of time.—Application of section 33 *of Proclamation* 14, 1902 (*T*) *and section* 6 *of Native Appeal Court.—Difference of authority conferred by sections.—Exempted Native.*

FACTS: Extension of time to note an appeal from the decision of the Native Commissioner at Ladysmith.

Where applicant in praying for extension of time within which to note an appeal was plaintiff in the Native Commissioner's Court and defendant was an exempted Native, and where the objection was upheld that the Native Commissioner had no jurisdiction and that the action should have been brought in the magistrate's court, and where the applicant wished to note an appeal against the decision of the Native Commissioner but was unable in time to obtain the necessary security of £5 required to be lodged with the clerk of the court when noting an appeal and where counsel

for respondent opposed the application and submitted that sec. 33 of Proclamation 14 of 1902 (T) is similarly worded to sec. 6 of the Native Appeal Court Rules.

HELD: That sec. 33 of Proclamation 14 of 1902 (T) makes provision for noting an appeal within 21 days and for the prosecuting of the appeal within three months and grants the High Court authority to extend the time of prosecuting the appeal only. It makes no provision for extension of time to note the appeal, whereas Rule 6 of the Native Appeal Court distinctly gives the Native Appeal Court authority to grant an extension of time to note an appeal.

As the applicant had advanced very good reasons for the delay in noting the appeal, the application was granted.

STUBBS, P., delivered the judgment of the Court: This is an application to appeal against the judgment of the Assistant Native Commissioner of Ladysmith delivered on the 20th May, 1930.

The applicant was plaintiff in the Native Commissioner's Court. Defendant was an exempted Native. Counsel for defendant submitted that the Court did not have jurisdiction and that the action should have been brought in the magistrate's court. The objection was upheld.

The Native Appeal Court rules provide (sec. 8) that an appeal from a judgment of a Court of Native Commissioner shall be noted by delivery to the clerk of such court of a notice stating what part of the judgment is appealed against and the grounds of appeal. The party noting an appeal must give security in the sum of £5 for the payment of the costs of the other party. Rule 6 provides that an appeal shall be noted within 21 days after the date of such judgment, but the Court of Appeal may in any case extend such period upon just cause being shown. Appellant did not note his appeal within 21 days. The present application is for an order extending the time for noting the appeal.

Rule 8 makes it imperative that a party noting an appeal must deposit the £5 security at the same time.

Applicant states that when the Native Commissioner upheld the objection he (applicant) was dissatisfied and wished to appeal, but was not possessed of the necessary security. He at once took steps to collect the money, but did not succeed in raising it until the 21 days had expired.

Counsel for respondent opposes the present application mainly on the ground that this Court has no authority to grant the order prayed for. In support of this contention he quotes the case *Jackson* v. *Smith* (Prentice-Hall, 9th June, 1928). That case was heard by the Transvaal Provincial Division of the Supreme Court. It was an application for leave to note an appeal after the time prescribed by sec. 33 of Proclamation 14, 1902 (T) had expired. The Court held that the noting of an appeal and the prosecution of an appeal were distinct from one another; that sec. 33 of the Proclamation was peremptory, and consequently, that the Court had no power to extend the time for noting an appeal.

Counsel for respondent submits that sec. 33 of the Proclamation referred to is similarly worded to sec. 6 of the Native Appeal Court rules, and that the decision in the Transvaal case governs the present application.

The proviso to sec. 33 of the Proclamation reads:—

> "Provided that the party appellant shall within 21 days next after such judgment, decree or order shall have been pronounced give notice of appeal to the party respondent and to the registrar of the court from which the appeal takes place and shall within three months after such judgment has been pronounced duly prosecute such appeal in the High Court of the Transvaal . . . . provided that it shall be lawful for the High Court of the Transvaal for good and sufficient cause shown to extend the time within which the appellant shall prosecute the appeal."

That section makes provision for noting an appeal within 21 days, and for the prosecuting of the appeal within three months and grants the High Court authority to extend the time of prosecuting the appeal only. It makes no provision for an extension of time to note the appeal. The High Court rightly held that sec. 33 did not give it authority to grant such an application. It obviously would have had authority to grant the application if it had merely been one for extension of time to prosecute the appeal.

Rule 6 of the Native Appeal Court referred to distinctly gives this Court authority to grant an extension of time to note an appeal. Sec. 33 referred to did not give the High Court that authority. It gave authority to grant extension of time to prosecute an appeal only.

The two sections confer different authority to each Court.

As to just cause it has been sufficiently shown that applicant had advanced very good reasons for the relief sought, and the delay in noting the appeal is only one of a few days. The legal issue involved is an important one. In our view, therefore, he is entitled to relief.

The application is granted.

NDHLEKE JAMA v. NOFANA JAMA.

1930. *June* 26. Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Presumption of legitimacy.—Inheritance. Custody of minor with guardian.—Return of cattle received as lobolo.—*Adultery.*

Facts: An appeal from the decision of the Native Commissioner at Port Shepstone.

In the court below plaintiff claimed from defendant the return of 13 head of cattle received as *lobolo* by defendant's uncle for his daughter and which cattle at the death of the said uncle were left to be inherited by his son, the plaintiff, on his becoming of age. Defendant having retained his cattle in his capacity as guardian of plaintiff, refused to deliver same on the grounds that plaintiff was an illegitimate child, plaintiff's mother having committed adultery. Judgment was entered for plaintiff with costs.

Held: That although adultery was admitted in the evidence, as the law presumes strongly in favour of the legitimacy of children and as the allegation that respondent was born as the result of the adultery was not proved, he must be regarded as the legitimate heir to his father's estate and as such is entitled to the return of the cattle claimed. The appeal was dismissed with costs.

For Appellant: Mr. *D. G. Shepstone*; for Respondent: No appearance.

Ahrens, Member of Court: This case was tried by Chief Mlomo and it was registered by the Chief's messenger at the office of the Native Commissioner as follows:—

> "Claim: For thirteen head of cattle, being cattle received as *lobolo* by defendant's uncle for his daughter Ntsoyi and

which cattle at the death of the said uncle were left to be inherited by his son—the plaintiff—at his becoming of age. Defendant having retained his cattle in his capacity as guardian of plaintiff, now refuses to deliver same on the grounds that he maintains that plaintiff was not a child born to the said uncle Mbekelwa by plaintiff's mother, but a child born to her by one Mthandwa."

"Judgment: For plaintiff as prayed with costs."

The defendant, having lost his appeal before the Native Commissioner, Port Shepstone, now appeals to this Court on grounds as fully set forth in his notice of appeal. The Chief, who gave evidence before the Native Commissioner in person, states that the claim was for the *lobolo* cattle of respondent's three sisters Ndhlweni, Nkulandela and another one whose name he has forgotten, which cattle, he finds, were received by appellant's father Mafa during the minority of the respondent. He states that he gave judgment for the total number of cattle received by Mafa for the three girls according to the claim of the respondent, presumably he means the cattle for Mtobi, Ntsoyi and Hlafuleni. This finding does not agree with the judgment as registered and already referred to.

There is no reason why his evidence should not be accepted, as he was the person who tried the case and there is no evidence on record, apart from the registered Record, to dispute his version.

It will be noticed in the evidence of the respondent that he is also laying claim to the property rights in the girl Nomaqubu because her mother was *lobolaed* with his sister's *lobolo* cattle. The appellant does not deny that he took the *lobolo* cattle of Kulu, respondent's eldest sister to pay for his wife, presumably Nomaqubu's mother. The Chief has apparently found that as appellant revived the house of Mbekelwa, father of respondent, by taking a wife *lobolaed* with Kulu's cattle, the respondent was not entitled to a return of such cattle. There being no cross-appeal, we are not called upon to decide this point.

The whole matter rests on the question of the legitimacy or otherwise of the respondent. The respondent himself admits that in his absence the appellant would inherit his late father's estate (Mbekelwa).

Mbekelwa, who had only one wife, had the following children born to him: (1) Kulu—daughter—married; (2) Mtobi—daughter—married; (3) Ntsoyi—daughter—married; (4) Hlafuleni—

daughter—married; (5) Nofane—son—respondent; (6) Son—died in infancy.

The appellant and his witnesses assert that the respondent is the son of Mthando Sikobi who had committed adultery with and impregnated respondent's mother.

Their evidence at the most with the exception of that of Rawuzela Jama merely goes to show that adultery was committed and this fact is not denied by the respondent.

Against this evidence we have that of respondent's witnesses. The evidence of Mthando is most significant. He is a disinterested party and there is no reason to doubt the veracity of his statement. He says: " Masima bore a girl named Mdhlakuveleni after I had paid damages for committing adultery with her (respondent) —Nofana was born a long time after the event of my committing adultery with his mother . . . . . I swear that I only had connection once with Masima . . . . . ." Rawuzela, if anything, corroborates him when he says: " Mdhlakuveleni was about three to four years old when Nofana was born."

The law presumes strongly in favour of the legitimacy of children. A child born after marriage, of which the wife was pregnant at the time of the marriage, is presumed to be the child of the husband, and so every child born subsequent to the marriage will be presumed to be the child of the husband. But the conduct of the parties and the surrounding circumstances taken together may be strong enough to raise an irresistible conclusion that the child born was not the child of the husband, but of another. The evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive, for the presumption is one which is not lightly to be repelled—See Powell on *Evidence* (Tenth ed., pp. 343 and 344).

There is no satisfactory and conclusive evidence before us to rebut the presumption of legitimacy. From the Record it would appear that there was no direct evidence led as to the exact number of cattle received in respect of *lobolo* for the three girls in question, which suggests that the trial before the Chief and the Native Commissioner confined itself to the question of legitimacy or otherwise of the respondent.

We find, unhesitatingly, that the appellant has failed to prove his assertion that the respondent was born as a result of the adultery between respondent's mother and Mthando, and therefore the

respondent is the legitimate son of the late Mbekelwa, and as such he is entitled to inherit his estate: the Native Commissioner in his reasons has apparently accepted the Chief's explanation which is to the effect that the latter gave judgment for the total number of cattle received by Mafa for three daughters of Mbekelwa.

Braatvedt, Member of Court: The present respondent was plaintiff in the Chief's Court. The register of Native Civil Cases tried by Native Chiefs discloses that the claim was for a certain girl named Ntsoyi, and that judgment was given in favour of the plaintiff (present respondent) with costs.

The appellant appealed to the Court of the Native Commissioner. In that Court the appeal was dismissed with costs.

The only question for consideration is whether the respondent is the son of the late Mbhekelwa, or an illegitimate son of Mbhekelwa's wife. If he is legitimate the finding of the court below is correct. If he is illegitimate the appellant is the rightful heir of the late Mbhekelwa.

Respondent was born during the subsistence of the marriage of Mbhekelwa and his wife. The presumption, therefore, is that he is legitimate. The *onus* of proving that he is illegitimate is on the appellant.

The weight of evidence is clearly in favour of the respondent. Apart from the presumption of legitimacy the other evidence in the case is strongly in his favour.

It has been abundantly proved that he is the legitimate son of the late Mbhekelwa and as such he is entitled to the cattle which were awarded to him. He is entitled to all the property in the estate.

Stubbs, P.: I concur.

The appeal is dismissed with costs.

1930. *June* 26. Before Stubbs, President, F. W. Ahrens and E. N. Braatvedt, Members of the Court.

Jurisdiction, Native Commissioners.—Local limits, section 10 *of Act* 38 *of* 1927.—*Government Notice No.* 298 *of* 1928.—*Proceedings void* ab origine.—*Costs.*

Facts: An appeal from the decision of the Native Commissioner at Durban.

Where the Record disclosed that the parties reside in the district of Mtunzuni, Zululand, and that the cause of action wholly arose in that district and where it was further disclosed that the parties were in casual employment at Durban within the area in respect of which the Native Commissioner, Durban, has jurisdiction and where the Native Commissioner dismissed an objection on the question of jurisdiction and tried the case.

Held: That the Native Commissioner derives his jurisdiction as to persons and things from sec. 10 of Act 38 of 1927, read with Government Notice No. 298 of 1928, prescribing the local limits within which he shall have jurisdiction, and that, as the parties were in casual employment at Durban it could not be held that they reside in such district for purposes of giving the Native Commissioner jurisdiction to try the issue.

It was therefore not competent for the Native Commissioner to have dealt with the case and the proceedings were quashed for want of jurisdiction. It was left open to appellant to bring the matter *de novo* in the Court of the Native Commissioner at Mtunzini.

The Court made no orders as to costs.

For Appellant: Mr. *W. T. Clark*; for Respondent: Mr. *D. L. Forbes.*

Stubbs, P.: In this matter the point was taken by the Court *suo motu* whether or not *ex facie* the Record the parties to the action "reside" within the area of jurisdiction of the Native Commissioner, Durban, so as to give him jurisdiction to try the case; objection having been taken in his Court that the defendant resided in the district of Mtunzini, Zululand. This has not been made the subject of a cross-appeal, but if the Native Commissioner had not jurisdiction then clearly the proceedings in his Court

would be void *ab origine* and this Court would of its own motion be entitled to take cognizance of the defect. The matter was therefore set down for argument by counsel in this Court on the 24th. instant.

Upon hearing argument the Court decided to refer the matter back to the Native Commissioner, Durban, for his reasons for dismissing the objection.

In reply he has sought to justify his action on a variety of grounds the fallacy of which dawns upon him as his argument develops and he concludes on a note of frank admission, for which I commend him, that he is out of Court and of course he is out of Court.

The Native Commissioner derives his jurisdiction as to persons and things from sec. 10 of Act 38 of 1927, read with Government Notice No. 298 of 1928, prescribing the local limits, within which he shall have jurisdiction. In regard to persons residing outside the local limits, he clearly has no jurisdiction. The Record shows that the parties reside in the district of Mtunzini, Zululand, and are subject to the Native Chief Somshokwe and the cause of action arose wholly within that district. They are for the moment in casual employment at the Point within the area in respect of which the Native Commissioner, Durban, has jurisdiction, and in no sense can it be said that they reside here for purposes of giving the Native Commissioner jurisdiction to try the issue.

The impermanency of their stay is of such degree as to make it quite impossible for it to fall within the meaning Mr. *Clark* would have us attach to residence. It is a stay governed by the exigencies of their casual employment at Durban and no more, and to hold that it must be taken to mean " reside " so as to give jurisdiction would be both illogical and absurd.

For these reasons it is obvious that it was not competent for the Native Commissioner to deal with the case.

The proceedings are quashed for want of jurisdiction.

It is open to appellant to bring the matter *de novo* in the Court of the Native Commissioner, Mtunzini.

There will be no order as to costs.

Ahrens, Member of Court: I concur.

Braatvedt, Member of Court: I concur.

1930. *June* 27. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Dissolution of a union.—Return of lobolo *cattle.—Sections* 168 *and* 169 *of the Code.*

FACTS: An appeal from the decision of the Native Commissioner at Mapumulo.

Where in the Court of the Native Commissioner appellant obtained a judgment against respondent, his wife, for the dissolution of the union and where the Native Commissioner purported to act in pursuance of sec. 168 of the Code in that it provides that on a dissolution of a union there shall be a return of cattle or their equivalent by the father or guardian of the woman to the husband, and made an order for the return of 10 head of cattle to appellant on re-marriage of the woman and where it was clear from the evidence that appellant was not entitled to the dissolution of the union.

HELD: That the Native Commissioner travelled beyond the authority of sec. 169 of the Code by making the return of cattle conditional on the woman's re-marriage in that the section lays down that the Court must clearly direct and order as to the number of cattle, if any, to be given back by the woman's father or guardian.

HELD, further: That although it is probable that the parties of the union would be more happily circumstanced were it dissolved, as it is clear from the evidence that the appellant is not entitled to the dissolution being granted as it would result in serious prejudice to both the woman and her father or guardian, the judgment of the Native Commissioner as a whole was set aside with costs without prejudice to appellant's right to bring a fresh action if he so desires, and establish his claim for divorce.

For Appellant: Mr. *G. F. Darwent*; for Respondent: Mr. *D. G. Shepstone.*

STUBBS, P.: The present appeal flows from divorce proceedings in the Court of the Native Commissioner, Mapumulo, by appellant against respondent in which the former obtained judgment for dissolution of the union.

Sec. 168 of the Code provides that on the dissolution of the union there shall be a return of cattle or their equivalent by the father or guardian of the woman to the husband. The Native Commissioner purporting to act in pursuance thereof, made an

order for the return of ten head of cattle to appellant on re-marriage of the woman. Such order as to the latter part is contrary to the terms of sec. 169 of the Code, which lays down, *inter alia*, that the number of cattle, if any, to be given back by the woman's father, or guardian . . . . . and the Court must clearly direct and order in terms thereof. But here the Native Commissioner has travelled beyond the authority of the section by making the return of such cattle conditional on the woman's re-marriage.

Turning to the action which forms the basis of the Native Commissioner's order it is abundantly clear from his own showing and the evidence that the appellant was not entitled to the dissolution of the union. It is therefore incumbent on this Court in considering the order made to enquire into and determine whether it can be rightly sustained, if there was not sufficient ground on which the order was made even if it had been made in the proper form, for the return of the *lobolo*, at once falls away.

It may be, it probably is, that the parties of the union would be more happily circumstanced, were it dissolved; but as the dissolution at the suit of the husband, who is now seeking the recovery of his cattle, and who is not entitled to the relief sought and granted, in respect of the divorce, would be likely to result in serious prejudice to both the woman and her father or guardian, because while she is made to appear blameless in respect of the divorce proceedings, he under the Section would be faced with the return of the cattle to appellant, it is not in the interests of justice, nor is it sound law, that the judgment of the Native Commissioner either in regard to the divorce itself or the order flowing therefrom, should be allowed to stand.

The judgment of the Native Commissioner as a whole is set aside with costs without prejudice to appellant's right to bring a fresh action, if he so desires, enabling him to bring sufficient evidence to establish his claim for a divorce.

I feel constrained to comment very strongly on the slipshod manner in which the evidence has been recorded, the admission of inadmissible evidence, and the lack of a proper presentment of the facts and reasons for judgment in support of his finding. Moreover, he has entirely ignored the provisions of Rule 26 (*a*) governing procedure in Courts of Native Commissioner.

AHRENS, Member of Court: I concur.

BRAATVEDT, Member of Court: I concur.

1930. *June* 27. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Non-timeousness in noting an appeal from a Chief's Court.— Jurisdiction of Native Appeal Court.

FACTS: In the matter of an application for an extension of time within which to appeal from the decision of a Chief in the Native Commissioner's district at Ndwedwe.

Where leave was prayed before the Appeal Court that applicant be granted 30 days from date within which to issue a summons against the respondent to appeal the decision of a Chief given on the 12th day of April, 1930, at Ndwedwe, and that the Native Commissioner there may hear and determine the case as if it were a case of first instance in such Court.

HELD: That the matter should properly come before the Native Commissioner at Ndwedwe, as it is for him to hear and determine the application, the discretion being a judicial one. The Native Appeal Court has no jurisdiction to hear the application. The application was refused.

CASES REFERRED TO: *Mfuneni Kuzwayo* v. *Mgwaqo Mtembu* (N.A.C. 1929).

For Applicant: Mr. *McSwaine*; for Respondent: In default.

STUBBS, P.: In this application the following order is prayed by Mr. *McSwaine*:—

> "That the applicant he granted thirty days from date within which to issue a summons against the respondent to appeal the decision of the Chief Mandhlakayise given on the 12th day of April, 1930, at Ndwedwe, at that the Native Commissioner there may hear and determine the case as if it were a case of first instance in such Court."

The matter should properly come before the Native Commissioner at Ndwedwe whose attention is directed to the ruling in the case of *Mfuneni Kuzwayo* v. *Mgwaqo Mtembu* (N.A.C. 1929). It is for him to hear and determine the application. The discretion is a judicial one.

This Court has no jurisdiction to entertain it at this juncture, but, if circumstances arise which warrant his decision being brought to this Court in appeal, it would then be competent to deal with the matter.

AHRENS, Member of Court: I concur.

BRAATVEDT, Member of Court: I concur.

made by the latter for their governance, an example of which is the Native Taxation and Development Act of 1925 one of the cardinal principles of which is the shifting of responsibility from the kraalhead to the individual inmates of his kraal for the payment of the tax. Moving along parallel lines toward concepts of liberty and responsibility the products of modern democracy, widening the gulf between the old despotism and the new order of things to be found on the one hand in the decline of the absolute authority and concommitant responsibilities of the kraalhead over the family—responsibilities and obligations which went the lengths reflected in the provisions of the Natal Code of Native Law—and on the other by the growth of independence of the individual in a line of conduct which in practice if not in theory has led inevitably to an appreciable emancipation from what he has since come to regard as the trammels of kraalhead authority and responsibility, the outcome of industrial psychology. However undesirable it may be from the viewpoint of ordered family life and good government, this crumbling away of institutions which form the basis of their polity and society, we cannot and should not ignore the results and the implications in applying principles of customary law which, whatever their merits in primitive times among primitive peoples and the ease with which they could then be applied ought to take account of the rising tide of race consciousness and individual independence of outlook and action involving closer scrutiny and the strict application of rules of interpretation to the changed order of things. In the process we should, however, guard against the temptation to mould the law to suit the times. That is not our function; we are concerned only in the interpretation and application of the law as we understand it leaving it to the legislative faculty to make such alterations and modifications as to it may seem meet. But we are none the less not relieved from the responsibility of interpreting the law properly, i.e., reasonably and logically having regard to its true import in the light of what has been said, and the question arises whether we should be entitled to say that the respondent in this case in seeking to fix the responsibility on the kraalhead (appellant) for the alleged transgression of his wife in having slandered another during her husband's absence at work in Pretoria can in law, and, if not in law in equity, be reasonably held to be responsible. In determining this point we should be careful not to strain the meaning of the law beyond the limit it

1930. *June* 27. Before STUBBS, President, F. W. AHRENS and E. N. BRAATVEDT, Members of the Court.

Liability of kraalhead for torts or crimes of inmates of his kraal. —Sections 214 and 73 of the Code.—Defamation of character. —Costs.

FACTS: An appeal from the decision of the Assistant Native Commissioner at Pinetown.

Where plaintiff in the court below claimed from defendant, a kraalhead, the sum of £10 being damages sustained by the plaintiff by reason of the defendant's wife having slandered the plaintiff by calling him a thief and obtained a judgment against defendant for £3 and costs; and where defendant appealed against this decision on the ground that appellant, although a kraalhead, was not liable for a tortious or criminal act committed by another of his district, that the appellant was not present at the alleged defamation but was working and living in the Transvaal and that it was never the intention of the Legislature to hold the kraalhead responsible for torts or crimes of the inmates under sec. 214 of the Code.

HELD: That the action was too remote to make the kraalhead (husband) liable at the suit of the defamed for the alleged slander by his wife.

HELD, further: That in view of the modifying effects of sec. 73 upon sec. 214 read with sec. 203 of the Code of Native law, which latter section says: " Defamation of character gives a civil remedy in damages against the defamer ", the kraalhead could not be held liable in the form in which the action was brought.

For Appellant: Mr. *D. G. Shepstone*; for Respondent: Mr. *A. de Charmoy*.

STUBBS, P.: In the march of time and events the Natives have moved in the van of progress. They have moved toward greater individual responsibility and obligation and their outlook is no longer governed to the same extent by the feudal system ushered in by the rulers in an era marked by the rigid rule of the despot over his tribe, the father over his household, the decline of which necessarily but perhaps unfortunately had its origin in their contact with the superior race and the modifying effects of the laws

They are differentiated from this case in that in the former it as sought to make the kraalhead liable for damages arising out a criminal charge of assault against the son the kraalhead at e time being at his kraal but, as stated, not actually present at e occurrence of the assault.

In the case relied on by respondent, *Piet Mabaso* v. *Samuel timkulu* (N.H.C. 1915), the circumstances are again differentiated that the kraalhead, the husband of the woman, was present nen the assault took place.

In the latter case it is permissible to postulate that, as the act mplained of was physical, it was within the physical ability of e kraalhead to have prevented his wife from committing it. At y rate if not, to have shown that he had done something to event it, but he did not.

In this case the alleged *injuria* resulted from words spoken by pellant's wife in his absence in Pretoria as stated. Quite viously it was morally beyond his power to prevent it. Whether be cited as the party to be sued because of the relation in which stands to the woman or whether she be sued assisted by him husband and kraalhead, it is argued would in effect have the me practical result as he would in any case be obliged to satisfy e judgment. In practice this is so but theoretically, though is liable for the payment of damages awarded, he is in law t capable of being made responsible in the form in which the tion is brought. That to my mind, although a theoretical dis- nction, involving an abstract principle, is nevertheless important that the author of the mischief should not be entirely absolved, her exclusion from the action and the fixing of the blame on m solely enables her to escape the consequences as well as the oral effect that such an action might be expected to have on r had she been cited and made to appear in association with her ardian as contemplated by section 226 of the Code.

To hold that in so remote an act as this the kraalhead is liable be sued alone for the slander because of his responsibilities as aalhead and because in any event his wife is a minor and has *locus standi* seems so obviously beyond all reason and logic, d so opposed to all ideas of the legal fitness of things, that I n bound to say I would indeed be loath to support so extreme interpretation of sec. 214 faced as one is by the modifying effects sec. 73 limiting the liability of kraalheads.

They are differentiated from this case in that in the former it was sought to make the kraalhead liable for damages arising out of a criminal charge of assault against the son the kraalhead at the time being at his kraal but, as stated, not actually present at the occurrence of the assault.

In the case relied on by respondent, *Piet Mabaso* v. *Samuel Mtimkulu* (N.H.C. 1915), the circumstances are again differentiated in that the kraalhead, the husband of the woman, was present when the assault took place.

In the latter case it is permissible to postulate that, as the act complained of was physical, it was within the physical ability of the kraalhead to have prevented his wife from committing it. At any rate if not, to have shown that he had done something to prevent it, but he did not.

In this case the alleged *injuria* resulted from words spoken by appellant's wife in his absence in Pretoria as stated. Quite obviously it was morally beyond his power to prevent it. Whether he be cited as the party to be sued because of the relation in which he stands to the woman or whether she be sued assisted by him as husband and kraalhead, it is argued would in effect have the same practical result as he would in any case be obliged to satisfy the judgment. In practice this is so but theoretically, though he is liable for the payment of damages awarded, he is in law not capable of being made responsible in the form in which the action is brought. That to my mind, although a theoretical distinction, involving an abstract principle, is nevertheless important in that the author of the mischief should not be entirely absolved, as her exclusion from the action and the fixing of the blame on him solely enables her to escape the consequences as well as the moral effect that such an action might be expected to have on her had she been cited and made to appear in association with her guardian as contemplated by section 226 of the Code.

To hold that in so remote an act as this the kraalhead is liable to be sued alone for the slander because of his responsibilities as kraalhead and because in any event his wife is a minor and has no *locus standi* seems so obviously beyond all reason and logic, and so opposed to all ideas of the legal fitness of things, that I am bound to say I would indeed be loath to support so extreme an interpretation of sec. 214 faced as one is by the modifying effects of sec. 73 limiting the liability of kraalheads.

If thirty years ago when the conditions of Native society were far less advanced than to-day the Supreme Court of this Province by a majority decision shrank from following the doctrine of kraal-head responsibility to the length of holding the kraalhead liable in damages arising out of an assault by one of the inmates, how very much stronger the ground for this Court at this lapse of time from that decision to take up a similar stand.

On the facts it is highly debatable whether the plaintiff in the court below has proved his case. I do not think he has. The learned Member Braatvedt will deal more fully with this aspect of the matter.

The appeal is sustained with costs and the judgment of the Native Commissioner is altered to one for defendant with costs.

Ahrens, Member of Court: In concurring in the judgment I merely wish to add that the decision in the case of *Kasi* v. *Vovo* (1919, N.H.C. p. 48) is strongly in support of the finding of the learned President in this case, and if there had been any doubt at all that has been entirely set at rest by the decision referred to.

It is also significant that in sec. 203 of the Code which deals with matters in regard to defamation of character, the word "kraal-head" does not appear, whereas in other sections under the same chapter, of which sec. 206 especially seems analogous with sec. 203, the kraalhead is specifically mentioned. If the defamer happens to be a minor, naturally he would have to be sued, duly assisted.

Braatvedt, Member of Court: I concur with the judgment of the learned President at whose request I shall briefly analyse the evidence in the case.

The respondent alleges that the appellant's wife called on him at his kraal early one morning and called out to him, "Come here you thief, to-day I will stop your thieving".

His two wives Ngengeni and Zipi corroborate his statement.

Respondent alleges that he reported the slander to a meeting of men which was held at appellant's kraal.

Three men who were present at the meeting referred to gave evidence for the appellant. Their names are Mnzongwa, Mdat-shulwa and Citshi.

They all state that the respondent attended the meeting, but that his wives did not attend. They all deny that respondent

made any mention of having been slandered by appellant's wife. They state that a certain boy named Mxitsheni admitted that he had stolen £2 2s. and that he said that he had given the money to respondent, who suggested that a diviner should be consulted.

The position therefore is this: That on the one hand we have the evidence of the respondent and his two wives who, one may presume, would naturally support their husband, and on the other hand the evidence of three independent men. I should certinly not hesitate to accept their evidence rather than that of respondent, who did not call a single outside witness. If he had been defamed he should have mentioned it at the public meeting. That he did not do, nor did his wives attend the meeting.

It would be the easiest thing imaginable for a man to bring a false charge in a case such as this, for his wives and members of his kraal could be relied upon to support him if instructed by him.

For the reasons stated the respondent failed to prove that the defamatory statement had been made and, on the facts alone, judgment should have been given against him.


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